71-1417

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U. S.
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No.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD

—and—

THE BOEING COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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§ 7 2
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Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, (the Union), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in the above-entitled case on March 14, 1972 (*infra,* p. 1a).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 79 LRRM 2443 (*infra*, pp. 5a-33a). The opinion of the National Labor Relations Board is reported at 185 NLRB No. 23 (*infra*, pp. 34a-45a). A companion opinion of the National Labor Relations Board is reported as *David O'Reilly*, 185 NLRB No. 23 (1970)[1] (*infra*, pp. 47a-58a).

JURISDICTION

The judgment of the Court of Appeals was entered on March 14, 1972 (*infra*, p. 1a). The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a member of a union may escape union discipline, exerted by the levy of a court-collectible fine, for violation of his union obligation to refrain from strikebreaking by resigning from his union subsequent to the commencement of a strike and engaging in strikebreaking after his resignation.

2. Whether the National Labor Relations Board is empowered to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking.

STATUTE INVOLVED

Section 8(b)(1)(A) of the National Labor Relations Act (29 U.S.C. § 151) and its proviso are at the statutory matrix of the controversy. Section 7 of the Act accords employees *inter alia* "the right to re-

[1] Petition for review pending before the Court of Appeals for the Ninth Circuit, *David O'Reilly* v. *N.L.R.B.*, No. 26,892.

frain" from "concerted activities for . . . mutual aid or protection." Section 8(b)(1)(A) makes it an unfair labor practice for a union "to restrain or coerce . . . employees in the exercise of the rights guaranteed in section 7. . . ." A proviso to this prohibition states that "this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein. . . ."

STATEMENT

I. The Strike

The Boeing Company operates a plant at New Orleans, Louisiana, known as the Michoud plant (A. 3). The production and maintenance employees at this plant are represented in collective bargaining by the Union and its parent, International Association of Machinists and Aerospace Workers, AFL-CIO (IAMAW) (A. 3-4). A single employer-wide collective bargaining agreement covers IAMAW-represented units at the Michoud plant and at other facilities of the Company located elsewhere in the United States (*ibid.*) About 1,900 production and maintenance employees work at the Michoud plant (A. 67).

A collective bargaining agreement covering the IAMAW-represented units at the Michoud plant and other Company facilities was in effect from May 16, 1963 through September 15, 1965 (A. 66-67, 3). No accord upon new contract terms was reached upon expiration of the agreement (A. 67, 5). A lawful employer-wide strike over the economic issues in dispute, and picketing in support of the strike, began on September 16, 1965 and ended on October 3, 1965 (A. 67, 5; 85-86).

The strike was preceded by a union meeting at which a strike vote was taken (A. 105, 184, Tr. 21). The Constitution of the IAMAW provides that "a strike vote . . . shall be by secret ballot. In order to declare a strike, such vote must carry by a three-fourths majority of those present and qualified to vote" (G.C. ex. 5, Art. XVIII, sec. 2, p. 54). The Constitution further requires that no strike may be declared without the approval of the Executive Council of the IAMAW, except that, "In an extreme emergency, . . . the I.P. [International President] may authorize a strike pending the submission to and securing the approval of the E.C. [Executive Council]" (*Id.*, Art. XVIII, Secs. 1, 2, pp. 53-54). The By-Laws of the Union provide that, "The approval of a strike, method of declaring a strike, and the settlement of a strike shall be in accordance with applicable provisions of the IAM Constitution" (G.C. ex. 6, p. 4).

A new agreement was reached on October 3, 1965, retroactive to October 2 (A. 67, 5; 85-86). The strike and picketing, which lasted eighteen days, embraced the Michoud plant (A. 67, 5, 25, n. 28).

II. The Imposition of Fines for Strikebreaking

The Constitution of the IAMAW defines "improper conduct of a member" and establishes a full trial and appellate procedure to determine the existence and punishment of alleged offenses (A. 214-218). Among the offenses defined as misconduct of a member is "Accepting employment in any capacity in an establishment where a strike or lockout exists as recognized under this Constitution, without permission" (A. 6; 214). The Constitution provides that this offense, like other "actions or omissions" constituting "misconduct

by a member," shall "warrant a reprimand, fine, suspension and/or expulsion from membership, or any lesser penalty or any combination of these penalties as the evidence may warrant after written and specific charges and a full hearing . . ." (A. 68, 5-6; 214). Disqualification from holding office for a period not exceeding five years is expressly enumerated as a penalty (A. 216).

Some 143 production and maintenance employees, who were members of the Union when the strike began, crossed the picket line and worked at the Michoud plant during all or part of the period of the strike (A. 67, 5). Some 24 of these strikebreakers made no attempt to resign from the Union during the strike period (A. 67). The remaining 119 strikebreakers did resign from the Union during the strike period (A. 67-68). Of these 119, 61 resigned from the Union and returned to work *subsequent* to their resignation, and 58 resigned from the Union but returned to work *before* their resignation (A. 67).

The Union tried all employees who were members of the Union when the strike began who were known to have worked during the strike, and assessed a penalty against each found guilty of strikebreaking, without regard to whether the accused had resigned from the Union during the strike period or had started to work subsequent to his resignation (A. 3, 13 and n. 11; 198-200). The proceedings resulted in a "Not Guilty" verdict as to two accused, a "No Fine" disposition as to a third, and a "Mistrial" without retrial as to a fourth (A. 239, 127). The remaining accused were found guilty of strikebreaking but a different penalty was assessed against a particular accused depending upon the class within which he fell. Those accused

who appeared before the trial committee, apologized, and pledged loyalty to the Union were in effect fined fifty percent of their strikebreaking earnings and disqualified from holding union office for varying periods (A. 68, 7; 188-189, 204-205). Those accused who did not appear for trial and were found guilty were fined $450 and disqualified from holding office for five years (A. 68, 6-7; 193).

The full $450 fine was assessed against 108 individuals, and the 50-percent-of-strikebreaking-earnings fine against 35 individuals (A. 67, n. 3). All were informed of their right to appeal the decision to the International President of the IAMAW (A. 7, n. 4; 229-230). No appeals were taken (A. 7, n. 4).

Payment of the fines has followed a checkered course. No $450 fine has been paid (A. 68). Reduced fines have been paid in full in eighteen instances and in part in three instances (A. 68; 238, 127). Payments have averaged $40 (A. 68; 205-206), and payments in full have ranged from a low of $10, a mid-point of $54.80, and a high of $120 (A. 238-239, 127). The Union has warned individuals that failure to pay would result in commencement of suit against them (A. 68-69, 7-8; 231-233, 71, 72). Suit has been instituted against nine individuals in local courts to recover the $450 fine assessed against each (A. 69, 8; 210-212, 240-241). The Company has undertaken the defense of these suits (A. 5). The outcome of the suits has not been determined (A. 69).

III. The Board's Decision

The claim before the Board was that the Union restrained or coerced employees in the exercise of their right to refrain from concerted activity for mutual aid

or protection in violation of Section 8(b)(1)(A) of the Act. The claim divided into two parts. First, although the Union's rule against strikebreaking is valid, the Union violated Section 8(b)(1)(A) by fining its members in an *unreasonably* large amount for violation of the rule, and by seeking or threatening to seek collection of that allegedly unreasonable fine by court action. Second, independently of the reasonableness of the fine, the Union violated Section 8(b)(1)(A) by fining in any amount those persons who had resigned from the Union for that strikebreaking activity in which they engaged *subsequent* to their resignation.

The first claim—the reasonableness of the fine—was dismissed by the Board (*infra*, p. 42a, n. 16). It relied for its rationale on its decision in *David O'Reilly*, 185 NLRB No. 22 (*infra*, pp. 47a-58a), which it issued on the same day as the opinion in this case. In *David O'Reilly*, one member dissenting, the Board held that, given the settled validity of a rule requiring members "to honor an authorized picket line" and the settled permissibility of punishing breach of the rule by "union fines (or court enforcement of same)", Congress did not intend "to have the Board regulate the size of these fines and establish standards with respect to their reasonableness" (*infra*, p. 55a). Rather, related as it is to "the fairness of union discipline meted out to protect a legitimate union interest" (*infra*, pp. 57a-58a), the issue of the reasonableness of a fine is to be determined by a court in a proceeding to collect or set aside the fine. The "local courts are the more logical tribunals for the establishment of standards of reasonableness" (*infra*, p. 55a).

The Board, one member dissenting, decided the second claim—pertaining to the situation of a person

who had resigned from the Union—in favor of the view that the Union violated Section 8(b)(1)(A) by fining a person who had resigned from membership for engaging in strikebreaking *subsequent* to his resignation. The premise of the Board's decision is that, while a member is bound to observe his union's valid rules during his period of membership, "the contract between the member and the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished" (*infra*, pp. 39a-40a). Accordingly, the Union "violated Section 8(b)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations" (*infra*, p. 42a). However, as to those resigners who engaged in strikebreaking *before* their resignation, the Union retained "the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them" (*infra*, p. 43a).

IV. The Decision of the Court of Appeals

The Court of Appeals, in agreement with the Board, affirmed its conclusion that "the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage" (*infra*, p. 21a). However, in disagreement with the Board, the Court of Appeals held that "it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised" (*infra*, p. 25a), and it directed the Board on

remand to determine "the questions relating to the reasonableness of the fines imposed by the Union" (*infra*, p. 33a).

REASONS FOR GRANTING THE WRIT

On August 27, 1970, in companion cases, the Board decided two important and interrelated questions concerning the scope of Section 8(b)(1)(A) of the National Labor Relations Act and its proviso. In this case it decided that a union may not levy a court-collectible fine for postresignation strikebreaking upon a person who had been a member of the union when the strike began but who resigned during the strike. In *David O'Reilly*, 185 NLRB No. 23 (1970), it decided that it was without power to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strikebreaking (*infra*, pp. 47a-58a). The Board applied its *O'Reilly* determination in this case. This case, accordingly, presents both branches of the Board's companion holdings, namely, that a union may not levy a fine for postresignation strikebreaking and that the Board is without power to determine the reasonableness of a fine assessed for preresignation strikebreaking.

The Board supported both holdings in reliance upon its understanding of this Court's three decisions interpreting the scope of Section 8(b)(1)(A) and its proviso (*infra*, pp. 39a-42a, 52a-56a). *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175 (1967); *N.L.R.B.* v. *Marine and Shipbuilding Workers*, 391 U.S. 418 (1968); *Scofield* v. *N.L.R.B.*, 394 U.S. 423 (1969). As the Court of Appeals saw it, the Board had wrongly read this Court's decisions on the preresignation issue (*infra*, pp. 23a-25a), but had rightly read the same de-

cisions on the postresignation issue (*infra*, pp. 13a-17a). It therefore disagreed with the Board's preresignation holding but agreed with the Board's postresignation holding.

This Court should grant certiorari in this case to review both issues, important and recurrent in the administration of the Act, in the one case in which each is squarely presented.

I

On March 20, 1971, this Court granted certiorari to consider the postresignation issue in *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, October Term, 1971, No. 71-711. 40 U.S.L.W. 3455. As expressed by the Board in its petition, the question presented is whether "a union violates Section 8(b)(1)(A) of the National Labor Relations Act by fining employees who resigned from union membership and then returned to work during a lawful union-authorized strike, and by seeking judicial enforcement of the fines." But it is this case, not *Granite State*, which presents this question forthrightly and unequivocally, and it is in this case, not *Granite State*, in which the Board stated its rationale in support of its position.

In *Granite State*, in denying enforcement of the Board's order, the Court of Appeals for the First Circuit suggested that *Granite State* may be critically different from this case (*N.L.R.B.* v. *Granite State Joint Board*, 446 F.2d 369, 372, n. 5 (C.A. 1, 1971)):

> . . . [T]he *Boeing* case, *supra*, may be distinguishable on its facts since in *Boeing* the fines were authorized by a general provision in a union constitution, rather than by a specific decision of the

membership adopted in the context of a particular strike. In *Boeing* the Board emphasized that "the Union had not warned members about the possible imposition of disciplinary measures." Also, the *Boeing* opinion did not consider whether any of the employees who crossed the picket line had originally voted to support the strike.

In this case, the court below embraced the distinctions suggested by the First Circuit, and in reliance on them stated that "we believe that the [*Granite State*] decision is inapposite to the present fact situation" (*infra*, p. 18a). It reasoned that (*infra*, pp. 18a-19a):

> Although the court in *Granite State* upheld the right of the union involved to impose fines on strikebreakers for post-resignation activity, it emphasized that a specific set of facts was present which it believed rendered such a result equitable, and it specifically recognized that these considerations were not present with respect to the instant Booster Lodge 405 case. In *Granite State,* the Board conceded that all of the fined employees had voted in favor of the strike in question. It is also important to note that the fines had not been imposed pursuant to a general provision in the union constitution, as here, but rather in accordance with a specific proclamation which had been unanimously adopted by the membership after the work stoppage commenced. *See* 446 F.2d at 370, 372 n. 5. Furthermore, all of those who were disciplined in *Granite State* had been expressly prewarned of possible punishment for strikebreaking, while the employees with whom we are herein concerned received no such pre-strikebreaking notification. Because of these distinguishing facts, we refuse to apply the rationale of *Granite State* to the instant factual situation. The strong equities which weighed in favor of the union there,

> are clearly not present here. In fact, their very absence powerfully supports the result which we have accepted.

The First Circuit thus holds, and the District of Columbia Circuit does not disagree, that a member despite his resignation is bound to refrain from strike-breaking for the duration of a strike when at the outset of the strike he made his own *individual* decision to go out on strike. But the issue which the Board presents, which the District of Columbia Circuit decides, and which the First Circuit reserves, is whether a member is bound by the *institutional* decision to strike whether or not he was individually opposed to that group decision. The District of Columbia Circuit holds that a member by resigning may renounce the institutional decision to strike at least in the absence of a showing that he individually assented to the decision initially.

It is only this case, and not *Granite State,* which thus squarely presents the issue of whether or not a member is bound for the duration of the strike by the group decision to strike, whatever his own original personal choice, which he cannot escape by resigning. And it presents the issue in a situation which is typical of the way in which strike decisions are generally made. In this case, in order to authorize a strike, a strike vote by secret ballot was mandatory, a three-fourths majority vote in favor of the strike was necessary to call the strike, and the strike call was further dependent on having the sanction of the Executive Council of the International Union (*supra,* p. 4). As thus presented in this typical posture, the heart of the question is whether the minority is bound by the majority's choice. Central to the answer is the indis-

pensability to effective labor action of binding the entirety of the members for the duration of the strike to the institutional decision to strike that the majority has made. And the essence of a secret ballot is its secrecy, a secrecy which the District of Columbia Circuit requires be broken if effect is to be given to its notion that a member is bound by the institutional decision only if he himself individually favored it when it was made.

While the First Circuit suggested the distinctions between this case and *Granite State,* it explicitly stated that "[w]e express no opinion, however, as to whether these distinctions are determinative" (446 F.2d at 372, n. 5, see also *id.* at 374, n. 8). The District of Columbia Circuit in this case, while purporting to rest on the distinctions that the First Circuit identified, nevertheless noted that "[t]o the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it" (*infra,* p. 19a, n. 19). Subsequent to both decisions the Court of Appeals for the Fifth Circuit rejected the Board's application of its postresignation holding to the levy of a fine in which the sole sanction for nonpayment was debarment from union membership. *Local 1255, IAMAW* v. *N.L.R.B.,* 79 LRRM 2787, March 15, 1972, *infra,* pp. 68a-73a. The Fifth Circuit noted that "[t]o the extent that [the District of Columbia Circuit's decision in] *Boeing* may be read to support the Board's position that all forms of discipline for postresignation picket-line-crossing are barred by the Act, we respectfully decline to follow it" (*infra,* p. 71a, n. 1).

This Court should grant certiorari in this case and set it for argument together with *Granite State* so that

the postresignation issue will be before the Court in its entirety in an unequivocal, typical, and fully-developed posture. Sound and informed decision will be enhanced by having before the Court the very case in which the Board expressed its rationale and which presents the issue in straightforward fashion. *Granite State* alone does not present the fact situation which the Court must address if the heart of the question is to be reached and decided.

II

The Board holds, but the Court of Appeals disagrees, that the Board is without power to determine the reasonableness of a fine assessed by a union against a member for violating its valid rule against strike-breaking. The question of the power of the Board to determine the reasonableness of a union fine levied to enforce a valid union rule is important and recurrent.[2] Were the Board held to have this power the

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[2] Its recurrence is patent. *Milwaukee Printing Pressmen Union No. 7*, 192 NLRB No. 122, 78 LRRM 1047 (1971); *Passaic Printing Pressmen's Union No. 60*, 190 NLRB No. 38, 77 LRRM 1199 (1971); *International Association of Machinists, Oakland Lodge No. 284*, 190 NLRB No. 32, 77 LRRM 1100 (1971), review pending *sub nom.*, *Morton Salt Co.* v. *N.L.R.B.*, C.A. 9, No. 71-1853; *Communications Workers of America, Local 6135*, 188 NLRB No. 144, 76 LRRM 1635 (1971); *International Chemical Workers Union, Local 143*, 188 NLRB No. 100, 76 LRRM (1971); *Communication Workers of America, Local 9511*, 188 NLRB No. 63, 76 LRRM 1324 (1971); *United Construction Workers, Local 10*, 187 NLRB No. 99, 76 LRRM 1121 (1971); *Washington-Baltimore Newspaper Guild, Local 35*, 186 NLRB No. 133, 75 LRRM 1438 (1970); *Communication Workers of America, Local 2100*, 186 NLRB No. 132, 75 LRRM 1441 (1970); *United Rubber Workers of America, Local 510*, 186 NLRB No. 106, 75 LRRM 1420 (1970); *Communication Workers of America*, 186 NLRB No. 50, 75 LRRM 1324 (1970).

determination of reasonableness would become a new but permanent part of the Board's business. Pending final determination of the existence or absence of power, and under the impetus of the decision below, unfair labor practice charges claiming unreasonableness will continue to be filed, with the NLRB General Counsel at a loss to know whether to dismiss the charge in reliance upon the Board's position or to entertain the charge in reliance upon the reversal by the court below. Uncertainty as to whether the Board is an appropriate forum similarly vexes both those persons who wish to prosecute and those who must defend against claims of unreasonableness. State courts will also be troubled by concern over the respective roles of the Board and the courts within this field, a concern not quieted by the observation of the court below that the "question of the extent to which union action for enforcement of disciplinary penalties is preempted by federal law is not before this court, and we intimate no view concerning the resolution of this complex issue" (*infra*, p. 25a, n. 30). It is therefore essential that this Court settle the question of the Board's power without delay.

1. The court below states that the Board's conclusion that it is without power "is based upon a clear misconception of the law and the Supreme Court's relevant decisions" (*infra*, p. 23a). For its view of the right reading of this Court's decisions it refers to this Court's advertence to a "reasonable fine" in *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 183 (1967), and in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428, 436 (1969) (*infra*, pp. 23a-25a). But the court below quite mistakes the meaning of the statements alluding to a "reasonable fine." These statements are

all referable to the conclusion in both *Allis-Chalmers* and *Scofield* that the *body* of Section 8(b)(1)(A) had not been violated and for that reason there was no need to rely on the *proviso*. It is the *proviso* which bars the Board from inquiry into the reasonableness of a union fine, and neither *Allis-Chalmers* nor *Scofield* addresses the interpretation of the *proviso* as a limitation upon the Board's power. It is essential that this Court clarify the meaning of its decisions.

2. To say that the Board is empowered to determine the reasonableness of a fine is to upset the existing allocation of function in overseeing the administration of union discipline. Reasonableness is a question for judicial determination under state law and the Labor Management Reporting and Disclosure Act. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield*, 394 U.S. at 426, n. 3. ". . . [S]tate courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe hardship'." *Allis-Chalmers*, 388 U.S. at 193, n. 32. "The reasonableness of the fines is a matter for the state court to determine . . . ." *U.O.P. Norplex* v. *N.L.R.B.*, 445 F.2d 155, 158 (C.A. 7, 1971). In short, except as entry into the field is narrowly required to determine whether a union rule offends a policy of the National Labor Relations Act, regulation of internal union affairs is a field from which Congress has excluded the Board. *International Brotherhood of Boilermakers* v. *Hardeman*, 401 U.S. 233, 237-241 (1971).

To permit the Board to trespass on this field would entail intolerable risks of collision with state courts.

State courts regularly and routinely adjudicate the reasonableness of union fines.[3] Were the Board also empowered to determine this question, the Board in the same case might find a fine reasonable which a court might find unreasonable, or the Board might find a fine unreasonable which the court might find reasonable. Since both the Board and the court would be exercising independent jurisdiction, each as competent to act as the other, there would be no basis for according priority between them, nor would either be required to stay its hand in deference to the other. Each would operate concurrently and conflict in result would be resolved by the happenstance of which proceeding ended sooner in a determinative disposition.[4] And if conflict were not resolvable in this way it would not be resolvable at all short of decision by this Court. For the Board surely does not sit as a supervisory tribunal to review or displace judicial judgments. Nor should it sit as a supplementary tribunal additional to the courts to adjudicate claims arising from administration of internal union discipline.

The decision below thus dislocates the existing allocation of function, bringing the Board into the business allotted to the courts, and needlessly exacerbating state-federal relations.

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[3] *E.g. North Jersey Newspaper Guild Local No. 173* v. *Rakos*, 110 N.J. Super 77, 264 A.2d 453, 74 LRRM 2487 (N.J. Sup. Ct. App. Div. 1970); *L. A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct. App. Dept. 1969); *Jost* v. *Communications Workers of America*, 91 Cal. Rep. 722, 64 CCH Lab. Cas. ¶ 52,469, p. 67,910 (Cal. Sup. Ct. App. Dept. 1970); *Walsh* v. *Communications Workers of America*, 271 A.2d 148, 75 LRRM 2629, 2632 (Md. Ct. of App. 1970).

[4] *Penn General Casualty Co.* v. *Pennsylvania*, 294 U.S. 189, 195 (1935); *Ballantine Books* v. *Capital Distributing Co.*, 302 F.2d 17, 19 (C.A. 2, 1962).

3. The decision below also upsets the statutory scheme of the National Labor Relations Act under which it is the Board's business to protect an employee's job rights but not his membership rights.

Short of invoking a union security agreement to require a member to pay his union dues and initiation fee, the "policy of the Act is to insulate employees' jobs from their organizational rights. Thus §§ 8(a)(3) and 8(b)(2) were designed to allow employees to freely exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperilling their livelihood." *Radio Officers' Union* v. *N.L.R.B.*, 347 U.S. 17, 40 (1954). The object of statutory solicitude is thus job rights. The employee is protected in his status as an employee against reprisal for engaging in or abstaining from concerted activity for mutual aid or protection. The function of the Board is to safeguard the employee for his protected action or inaction in his status as an employee—in getting a job from an employer, in keeping a job with his employer, in being compensated for his work by his employer, and in enjoying the other emoluments of his work granted by his employer.

That is one side of the coin. The other side is that, so long as the employee's status as an employee is left alone, the union may discipline the employee as a member for failure to perform a valid membership obligation, and the Union's exercise of its disciplinary authority is none of the Board's affair. As a member, therefore, the employee may be expelled, suspended, fined, reprimanded, or disciplined in other ways, and objection to the means or extent of discipline is the concern of tribunals other than the Board.

It is this duality which this Court synthesized and preserved in *Allis-Chalmers* and *Scofield*. As the Court observed in *Scofield*, "As an employee, he may be a 'good, bad, or indifferent' member so long as he meets the financial obligations of the union security agreement . . . . But as a union member . . . he is subject to union discipline." 394 U.S. at 429, n. 5. The court below unglues this synthesis by requiring the Board to determine the reasonableness of a union fine and thus draws it into the internal administration of union discipline.

4. In injecting the Board into a field foreign to its statutory concern the decision below has already worked a major dislocation in the law pertinent to review of union discipline.

The court below directs the Board to determine the reasonableness of the fines despite the absence of any effort by the members to exhaust their available internal union remedies. Many did not appear for trial at all; others who appeared for trial and were fined took no internal appeal from the adverse decision (*supra*, pp. 5-6). Accordingly, those who did not appear for trial disregarded the internal union procedure altogether. Those who did appear for trial but did not appeal forewent the internal appellate opportunity for reversal or favorable modification. In sum, therefore, the internal union procedure was disregarded at its trial stage by many and at its appellate stage by all.

To require the Board to review the reasonableness of the fine when the internal union procedure for consideration of the issue has been bypassed conflicts with

the requirement that the available internal remedy be exhausted before relief is sought from other tribunals. Where an available union remedy is shunted, no extraunion tribunal should ordinarily consider in the first instance a question whose determination would distinctly benefit from full prior union scrutiny, which may be self-corrected if the claim is urged internally, and where forbearance would further the independent interest in union self-government. As Justice Harlan cautioned, "courts and agencies will frustrate an important purpose of the 1959 legislation if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." *N.L.R.B.* v. *Marine and Shipbuilding Workers,* 391 U.S. 418, 429 (1968) (concurrence).

But the court below flatly rejects the exhaustion requirement, holding that the "imposition of such a requirement in this case concerning the reasonableness issue would not . . . best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union" (*infra,* p. 23a, n. 27).

The requirement of exhaustion cannot be finessed by saying that the substantive issue "involves public policy." The doctrine of exhaustion has its source in a rule of judicial administration long and firmly established not only for internal union remedies but also in statutory administrative proceedings and for contractual adjustment procedures created by collective

bargaining agreements. It is part of "public policy" to require prior recourse to the tribunals having initial responsibility for decision before permitting intercession by other ultimate reviewing bodies. The interest in orderly procedure which the exhaustion requirement serves is as exigent whether the substantive issue to be adjudicated is said to be "public," "private," or an admixture. There is nothing in the nature of a "reasonableness" issue which suggests that it is not suited to prior union scrutiny through the union trial and appellate procedures. On the contrary, the issue especially implicates close attention to particularities, which resist useful generalization, and would therefore uniquely benefit from full initial union examination.

The court below invokes this Court's decision in *N.L.R.B.* v. *Marine and Shipbuilding Workers*, 391 U.S. 418 (1968), to support its view (*infra*, p. 23a, n. 27). But *Marine Workers* holds that exhaustion is not required where the rule for whose violation discipline is imposed is itself invalid. A rule against strikebreaking is of course valid, and the reasonableness of a fine for its breach is a question within the heartland of union self-government. Prior recourse to its procedures is hence obligatory if those procedures are adequate and fair. The court below thus again misreads this Court's decisions and in the process works a gross distortion of accepted law.

5. Section 8(b)(1)(A) and its proviso were enacted in 1947. The Board's consistent interpretation of the proviso, from the beginning to the present, is that it places the administration of union discipline to enforce a valid union rule outside its regulatory author-

ity.[5] It is of course settled that an agency's uniform construction of its own statute, especially a contemporaneous construction, "is entitled to great deference." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971). And in this case that "prior long-standing and consistent administrative practice must be deemed to have received congressional approval." *Fribourg Navigation Co.* v. *C.I.R.*, 383 U.S. 272, 283, (1966). For the Board's "interpretation of § 8(b)(1)(A) . . . was reinforced by the Landrum-Griffin Act of 1959 which, although it dealt with the internal affairs of unions, including the procedures for imposing fines or expulsion, did not purport to overturn or modify the Board's interpretation of § 8(b)(1)." *Scofield*, 394 U.S. at 429. An administrative construction with these credentials should stand. Yet the court below heedlessly upsets it.

In sum, the court below has decided an important and recurrent question in the administration of the Act in a way which conflicts with this Court's decisions, upsets the allocation to the courts of the function of overseeing union administration of internal discipline, injects the Board into a field foreign to its statutory concern, destroys the exhaustion require-

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[5] *International Typographical Union*, 86 NLRB 951, 957 (1949), affirmed, 193 F.2d 782, 800-801 (C.A. 7, 1951); *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954); *Foundation Co.*, 120 NLRB 1453, 1466 (1958); *Allen-Bradley Co.*, 127 NLRB 44, 47 (1960), enforcement denied, 286 F.2d 442, 446 (C.A. 7, 1961), but court's opinion not acquiesced in by Board, *Scofield*, 145 NLRB NLRB 1097, 1102 (1964), and Board's decision affirmed, 394 U.S. 423 (1969); *Local 248, United Automobile Workers*, 149 NLRB 67 (1964), affirmed, 388 U.S. 175 (1967); *Independent Stave Co.*, 175 NLRB 156, 159 (1969).

ment in an area where its operation is especially fit, and discards a long-settled and consistent administrative construction. Review by this Court is essential.

CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted, and the case should be set down for argument together with *N.L.R.B.* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO,* October Term, 1971, No. 71-711.

Respectfully submitted,

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April 1972

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24687

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

THE BOEING COMPANY, *Intervenor.*

No. 24744

THE BOEING COMPANY, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent,*

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, *Intervenor.*

Judgment

Filed March 14, 1972

Before: MacKinnon and Wilkey, Circuit Judges and Gourley,* Senior District Judge for the Western District of Pennsylvania.

The above consolidated causes came on to be heard upon petitions to review, and on a cross-application for enforcement of, an order of the National Labor Relations Board dated August 27, 1970, against Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and as-

* Sitting by designation pursuant to 28 U.S.C. § 294 (d) (1970).

signs. On February 3, 1972, the Court, being fully advised in the premises handed down its opinion granting enforcement of the Board's order in part and remanding the case in part to the Board for further consideration in accordance with the Court's opinion. In conformity therewith, it is hereby

ORDERED AND ADJUDGED by the Court that Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors and, assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Judgment, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix." Copies of said notice, on forms provided by the Regional

ctor for Region 15, (New Orleans, Louisiana), after g signed by an authorized representative, shall be ed at the aforementioned locations, in conspicious es, including all places where notices to employees are omarily posted, and reasonable steps shall be taken nsure that said notices are not altered, defaced, or red by other material.

) Notify said Regional Director, in writing, within ays from the date of this Judgment, what steps Union tioner has taken to comply herewith.

Is Further Ordered and Adjudged by the Court that ase be and it is hereby remanded in part to the Board further consideration in accordance with the Court's ion.

George E. MacKinnon
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Malcolm R. Wilkey.
Circuit Judge, United States Court of Appeals for the District of Columbia Circuit

Wallace S. Gourley
Senior District Judge, for the Western District of Pennsylvania

APPENDIX

NOTICE TO MEMBERS

POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

WE WILL NOT restrain or coerce employees who had resigned from the Union and who, in the exercise of their rights guaranteed in Section 7 of the Act, worked at the Michoud plant during the September 1965 strike, by imposing fines or by threatening to seek or by seeking court enforcement of said fines as to such employees.

WE WILL reimburse nonmembers abovementioned for any fines they may have paid to us for working during the said strike.

WE WILL NOT in any like or related manner restrain or coerce employees in the exercise of rights guaranteed to them in Section 7 of the National Labor Relations Act.

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO
(Labor Organization)

Dated ..... By .....
(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This Notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material.

Any questions concerning this Notice or compliance with its provisions, may be directed to the Board's Office, T6024 Federal Building (Loyola) 701 Loyola Ave., New Orleans, La. 70113 Telephone 504-527-6361.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,687

BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
THE BOEING COMPANY, INTERVENOR

No. 24,744

THE BOEING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT
BOOSTER LODGE NO. 405, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, INTERVENOR

Petitioners for Review and Cross-Application for Enforcement of Order of the National Labor Relations Board

Decided February 3, 1972

Mr. Bernard Dunau, with whom *Messrs. Plato E. Papps* and *C. Paul Barker* were on the brief, for petitioner in No. 24,687 and intervenor in No. 24,744.

Mr. C. Dale Stout for petitioner in No. 24,744 and intervenor in No. 24,687.

Mr. Glen M. Bendixsen, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman*, General Counsel at the time the brief was filed, *Dominick L. Manoli*, Associate General Counsel, *Marcel Mallet-Prevost*, Assistant General Counsel, and *Stanley R. Zirkin*, Attorney, National Labor Relations Board, were on the brief, for respondent.

Before MacKinnon and Wilkey, *Circuit Judges*, and Gourley,* *Senior District Judge* for the Western District of Pennsylvania.

MacKinnon, *Circuit Judge:* In this case, we are called upon to examine the right of a labor organization, consonant with the provisions of the National Labor Relations Act (N.L.R.A.), to discipline those members who have crossed its picket line to work during an authorized strike. We must determine the effect which a member's resignation from the union, before, during, or after such conduct, has upon the union's disciplinary authority. We are also requested to consider the legal implications of the "reasonableness" of the fines imposed, where the union has threatened enforcement thereof, or has actually sought collection through legal means.

The essential facts are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO (hereinafter sometimes referred to as the Union), and The Boeing Company, (hereinafter sometimes referred to as the Company), were parties to a collective bargaining agreement which was effective from May 16, 1963, through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant, as well as at various other locations. This work stoppage lasted 18

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1970).

[1] At the time of the execution of the 1963-1965 agreement, Booster Lodge No. 405 was not yet in existence. Boeing's Michoud, Louisiana plant, with which we are concerned in this case, was considered to be a "remote location" unit, identified with the "primary location" unit at Seattle-Renton, Washington. Therefore, the production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial Lodge No. 751, I.A.M., AFL-CIO, of Seattle, a signatory to the above-mentioned contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, with jurisdiction over the Michoud plant, but the bargaining agreement was not modified to reflect this occurrence.

days. On October 2, 1965, a new bargaining agreement was signed, and the economic strikers returned to work the following day. Both the expired agreement and the newly executed contract contained maintenance-of-membership clauses, which required all new employees to notify both the Union and the Company within 40 days of their acceptance of employment if they elected not to become Union members. It also required those who were Union members to retain their membership during the contract term.

During the strike period, approximately 143 employees, of tht 1900 production and maintenance employees represented by the Union at the Michoud plant, crossed the picket line and reported to work. All of these persons had been Union members during the 1963-1965 contract period. Some of the employees who worked during the strike made no attempt to resign from the Union during the strike. The remaining 119 submitted their voluntary resignations, in writing, to both the Union[2] and the Company. About 61 of the employees who resigned did so *before* they crossed the picket line and returned to work. Another 58 resigned during the course of the strike, but *after* they had crossed the picket line in order to work. All resignations were submitted after the expiration of the 1963-1965 contract, and before the execution of the new agreement, and all were submitted prior to the imposition of any Union discipline. Union members had not been warned prior to the strike that disciplinary measures could, or would, be taken against those who crossed the picket line to work, nor had any such

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[2] The Union objected below to the fact that notices of resignation were sent to District Lodge 751, rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original 1963-1965 agreement, as explained in footnote 1, *supra*, it is clear that the employees who notified District Lodge 751 were attempting to comply with the applicable contractual requirements. Furthermore, District Lodge 751 notified Booster Lodge 405 of all resignations it received. We thus see no validity in the objection.

discipline been imposed on members by Booster Lodge 405 prior to this time.

In late October or early November of 1965, the Union notified all members and former members who had crossed the picket line to work during the strike that charges had been preferred against them under the International Union Constitution, for "Improper Conduct of a Member" due to their having "accept[ed] employment . . . in an establishment where a strike exist[ed]." They were advised of the dates of their Union trials, which were to be held even in their absence if they did not appear, and they were notified of their right to be represented by any counsel who was a member of the International Association of Machinists and Aerospace Workers. Pursuant to the International Union Constitution provision which permitted the imposition of disciplinary measures, including "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination," where a member had been found guilty of misconduct after notice and a hearing, fines were imposed on all employees who had worked during the strike. No distinction was drawn between those persons who had resigned from the Union during the course of the strike and those who had remained Union members.

Employees who did not appear for trial before the Union Trial Committee and those who appeared but were found guilty were fined $450.00 each, the amount determined by the membership, and they were barred from holding a Union office for a period of 5 years. The fines of about 35 employees who appeared for trial, apologized, and pledged loyalty to the Union, were reduced to 50 percent of the earnings they received during the strike.[3] In some of

[3] Employees who worked during the strike earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike period were supplemented by the inclusion of bonus or premium rates for weekend and overtime work.

these cases the time period during which these persons were prohibited from holding Union office was decreased to a period based upon the number of days of strikebreaking activity each respective person had engaged in. None of the disciplined individuals processed intra-Union appeals.

Although none of the $450.00 fines has been paid, reduced fines have been paid in some instances. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed if the fines remain unpaid, and that reduced fines will be reinstated to $450.00 in the event of nonpayment. The Union has also filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). None of these suits has yet been resolved.

On February 18, 1966, the Company filed a charge with the N.L.R.B., alleging that the Union had violated Section 8(b)(1)(A) of the N.L.R.A.[4], and a complaint was issued by

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[4] 29 U.S.C. § 158(b)(1)(A) (1970), which provides:

(b) It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

29 U.S.C. § 157 (1970) provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

the General Counsel. The Labor Board decided that the Union violated section 8(b)(1)(A): (1) by fining those employees who had resigned from the Union before they returned to work during the strike; and (2) by disciplining those employees who had resigned after returning to work, to the extent that the fines were imposed for their working during the strike after their resignations. The Board further found that the Union did *not* violate the Act (3) by fining members for crossing the picket line to work, and by fining those employees who had resigned after returning to work during the strike, for work they performed during the strike prior to their resignations.

Finally, the Board determined (4) that it was not the intention of Congress to have the N.L.R.B. regulate the size of such disciplinary fines and establish standards with respect to their reasonableness, and it dismissed the claim that otherwise legal fines may be rendered violative of the N.L.R.A. if unreasonably large. A cease and desist order was issued, and the Union was ordered to refund any fines collected from employees who had resigned before returning to work. The Union was also required to refund a pro rata portion of those fines collected from employees who had resigned after first engaging in work during the strike, so that the part of the fines retained would only reflect pre-resignation conduct.

Booster Lodge 405 challenges the Board's conclusion that a mid-strike resignation from a union relieves an individual from the burden of union discipline with respect to his post-resignation activity, while The Boeing Company contends that the N.L.R.B. should have examined the reasonableness of the fines imposed by the Union. The Board seeks enforcement of its order.

Part I of this opinon discusses the legality of the imposition of the disciplinary fines by the Union in response to the strikebreaking by the approximately 143 employees in-

volved. Part II considers the effect the reasonableness of the fines has upon their propriety under the N.L.R.A., and the proper function of the N.L.R.B. in this area. Finally, Part III deals with the propriety of the Board's remedial order.

I

The Legality of the Disciplinary Fines

A. *The Employees Who Did Not Resign*

As early as 1954, in *Minneapolis Star and Tribune Co.*, 109 NLRB 727 (1954), the Labor Board held that a union did not violate Section 8(b)(1)(A) of the Act by imposing a fine on a member for his failure to perform picket duty during the course of an authorized strike. The Board declared that the *proviso* to 8(b)(1)(A)[5] precluded any interference by it with the internal affairs of a labor organization in such a situation. In *N.L.R.B.* v. *Allis-Chalmers Manufacturing Co.*, 388 U.S. 175 (1967), a divided Supreme Court similarly determined that a union did not violate the N.L.R.A. when it imposed, and attempted to enforce through court action, reasonable fines against members for their failure to honor an authorized picket line. Instead of relying upon the express language of the *proviso*, however, the Supreme Court carefully analyzed the entire legislative history of Section 8(b)(1)(A), and it concluded that Congress did not intend to prohibit such internal union discipline by the prohibition against "restraint" or "coercion." See 388 U.S. at 183-195.[6] The Court noted:

> National labor policy has been built on the premise that by pooling their economic strength and acting

[5] *See* n. 4, *supra*.

[6] For another good analysis of the legislative history of § 8(b)(1)(A), *see National Maritime Union*, 78 NLRB 971, 982-987 (1948), *enfd.*, 175 F.2d 686 (2nd Cir. 1949), *cert. denied*, 338 U.S. 954 (1950).

through a labor organization freely choosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions. The policy therefore extinguishes the individual employee's power to order his own relations with his employer and creates a power vested in the chosen representative to act in the interests of all employees. "Congress has seen fit to clothe the bargaining representative with powers comparable to those possessed by a legislative body both to create and restrict the rights of those whom it represents . . ."

388 U.S. at 180. See *J. I. Case Co.* v. *N.L.R.B.*, 321 U.S. 332 (1944). The Court further stated:

> Integral to this federal labor policy has been the power in the chosen union to protect against erosion [of] its status under that policy through reasonable discipline of members who violate rules and regulations governing membership. That power is particularly vital when the members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement upon its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent . . ."

388 U.S. at 181.

In more recent decisions, the Supreme Court has reaffirmed the right of a union to impose and enforce reasonable fines against members who engage in strikebreaking activities. In *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 428-430 (1969), the Court emphasized the right of a union to enforce a properly adopted rule which reflects a legitimate union interest, impairs no statutory labor policy, and is reasonably enforced against union members. *See N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 423 (1968). *See also*

Rocket Freight Lines Co. v. *N.L.R.B.*, 427 F.2d 202, 205-206 (10th Cir.), *cert. denied*, 400 U.S. 942 (1970); Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 GEO. WASH. L. REV. 187 (1969). In light of these developments,[7] it is clear that the Union acted within the sphere of its lawful authority when it decided to impose fines on the 24 strikebreaking members who did not resign from the Union.[8] Similarly, the Union's threats to enforce these fines, as well as its actual efforts to achieve court enforcement thereof, were not prohibited by the N.L.R.A.. However, a more difficult question arises with respect to the 119 employees who resigned from the Union during the strike period.

B. *The Employees Who Did Resign*

As the Supreme Court recognized in *Allis-Chalmers*, when Section 8(b)(1)(A) was enacted, "Congress was operating within the context of the 'contract theory' of the union-member relationship which widely prevailed at that time." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 192. *See International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 618 (1958). Under this theory union membership was deemed in effect to create a "con-

[7] The Company has asked this court to overrule *Allis-Chalmers* in order to force reconsideration of the union discipline area by the Supreme Court, but that is not our function. We recognize that "the Supreme Court should retain the exclusive privilege of overruling its own decisions, save perhaps when opinions already delivered have created a near certainty that only the occasion is needed for pronouncement of the doom." *Salerno* v. *American League of Professional Baseball Clubs*, 429 F.2d 1003, 1005 (2nd Cir. 1970), *cert. denied*, 400 U.S. 1001 (1971). In light of *Scofield* and *Marine Workers*, any argument for such reconsideration must be addressed to the Supreme Court itself. *See U. S. Gypsum Co.* v. *Steelworkers*, 384 F.2d 38, 42-44 (5th Cir. 1967), *cert denied*, 389 U.S. 1042 (1968); *United States* v. *Ullman*, 221 F.2d 760, 762 (2nd Cir. 1955), *affd.*, 350 U.S. 422 (1956).

[8] *See* Part II, *infra*, regarding the effect of the "reasonableness" of the fines imposed on their legality under § 8(b)(1)(A).

tract" between the labor organization and the member which imposed certain obligations on the member, and the decision emphasized "that 'The courts' role is but to enforce the contract.'" 388 U.S. at 182. *See* Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L. J. 175, 180 (1960). It is, therefore, obvious that *membership* in the labor organization is the *sine qua non* to the authority of a union to impose desciplinary burdens upon the employees it represents. This has been widely recognized.

In *Allis-Chalmers*, the Court expressly limited its holding to "reasonable discipline of *members* who violate rules and regulations governing *membership*." *N.L.R.B.* v. *Allis-Chalmers Mfg. Co. supra*, 388 U.S. at 181 (emphasis supplied). *See also id.* at 195-196.[9] The Labor Board specifically recognized this indispensable prerequisite in *Scofield*, 145 NLRB 1097, 1104 (1964), where it noted that "[a] union rule that a *member* is subject to a fine if he [violates a valid union rule] does not mean that he is subject to such a fine as an *employee*." (emphasis in original) This membership requirement for union disciplinary authority was affirmed by the Supreme Court in *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 429 n. 5:

> As an employee, [an individual] may be a "good, bad, or indifferent" member so long as he meets the finan-

[9] In *Allis-Chalmers*, all of the persons disciplined by the union enjoyed full membership status. Thus the Court was not required to decide what obligations vis-a-vis the union a person would be under where he was not a full member, but only a "limited member" who merely paid dues and fees in accordance with an appropriate union-security agreement. 388 U.S. at 197. *See* 29 U.S.C. § 158(a)(3) (1970); *N.L.R.B.* v. *General Motors Corp.*, 373 U.S. 734, 742 (1963). Since the contracts involved in the instant case only contained maintenance-of-membership provisions, employees were either full members or total non-members. For this reason, we too intimate no view regarding the obligation which a union may lawfully impose on a person whose only ties with the labor organization are his payment of dues and fees.

cial obligations of the union security contract. * * * But *as a union member, so long as he chooses to remain one, he is subject to union discipline.* (emphasis supplied)

See 394 U.S. at 435. Thus the Court recognized that "union members . . . are free to leave the union and escape the [union] rule." *Id.* at 430.[10] It is therefore apparent that *Booster Lodge 405 only had the authority to discipline those employees who were in fact Union members at the time they engaged in the complained of activity.*

Approximately 58 of the employees who worked during the strike submitted their resignations to the Union *after* they had already engaged in some of the conduct proscribed by the International Union Constitution. In light of the above discussion regarding union authority over action undertaken by full members, we must concur in the Board's determination that the Union did not violate Section 8(b)(1)(A) *so far as its imposition of disciplinary fines concerned this pre-resignation conduct.* The fact that the fines were not officially imposed for these pre-resignation breaches of Union regulations until after the strikebreakers had resigned, in no way negated the authority of the Union

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[10] "[N]o employee is subject to union rules if he chooses to forego the privileges and duties of union membership." Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield*, 38 Geo. Wash. L. Rev. 187, 190 (1969). *See International Association of Machinists and Aerospace Workers, Local Lodge 504*, 185 NLRB No. 22, 75 LRRM 1008 (1970). Since unions are only authorized to impose discipline where legitimate *internal affairs* are concerned, *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra; Scofield* v. *N.L.R.B., supra; N.L.R.B.* v. *Marine Workers*, 391 U.S. 418, 424 (1968); *Local 138, International Union of Operating Engineers*, 148 NLRB 679, 682 (1964), it is clear that any effort to fine non-members would constitute an attempt to affect *external activities*, an area in which Congress did not intend to permit such union regulation. This was correctly recognized by the N.L.R.B. in this case.

over these persons with respect to these acts, as the N.L.R.B. properly recognized.

> The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employees' resignations was only to extinguish the Union's future authority over them.

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, 185 NLRB No. 23, 1970 CCH NLRB ¶ 22,259, at p. 28,693 (1970).[11]

C. *Fines Imposed for Post-resignation Conduct*

An extremely difficult question is presented with respect to the fines which were imposed upon employees for their *post*-resignation conduct.[12] Booster Lodge 405 has made a sophisticated argument which would expose persons who were members at the commencement of a particular strike to union discipline with respect to any strikebreaking action undertaken during that specific work stoppage. Although it concedes that such a restriction is not contained in any of

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[11] A resignation acts to terminate the existing relationship so far as the incursion of future obligations is concerned. Previously established or perfected liabilities survive the termination. *See* 5A CORBIN, CONTRACTS § 1229, pp. 508-510 (1964).

[12] This would, of course, include the approximately 61 persons who resigned from the Union *before* engaging in any strikebreaking activity, as well as the 58 persons discussed previously, who resigned during the period of their strikebreaking, so far as their actions undertaken *after* they effectively resigned are concerned.

the express language of the International Union Constitution or By-laws, the Union urges this court to "flesh out" such documents by imposing such an obligation by implication. We must decline this invitation.

It must be emphasized that in situations like this, while "the function of the court is to determine, as far as is possible, the intention of the contracting parties and to give legal effect thereto," [13] it is generally recognized that courts will not usually imply offenses not specified in a union's constitution or by-laws.[14] We believe that this latter consideration is controlling with respect to the instant case. As the Union recognizes, there is nothing in the record which evidences any intention on the part of the approximately 119 persons who resigned during the strike in question that their initial acceptance of Union membership would impose upon them the type of continuing obligation which Booster Lodge 405 now asks this court to impose. Furthermore, the very fact that they resigned during this period, in an obvious attempt to escape the disciplinary authority of the Union, belies this proposed line of reasoning.

In addition, an extremely important national labor policy militates against the imposition of such an implied obligation. Section 7 of the N.L.R.B.[15] expressly protects the right of any employee to refrain from any or all of the concerted activities guaranteed to employees under the Act. While *Allis-Chalmers* and *Scofield* recognized the legality of certain *express* union provisions limiting an employee's freedom where he had voluntarily accepted full union membership, nothing in those decisions supports the Union's theory of implied, post-resignation restrictions. In fact, language

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[13] 1 CORBIN, CONTRACTS § 95, p. 396 (1963).

[14] Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1059-1061 (1951), and *see* cases cited therein.

[15] 29 U.S.C. § 15 (1970). *See* n. 4, *supra*.

in *Scofield* expressly indicates otherwise. The Supreme Court only recognized the right of a union "to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union *members who are free to leave the union and escape the rule.*" *Scofield v. N.L.R.B., supra*, 394 U.S. at 430 (emphasis supplied). As the Board properly concluded below, after resignation, "[b]oth the member's duty of fidelity and the union's corresponding right to discipline him for breach of that duty are extinguished." *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, supra*, 1970 CCH NLRB ¶ 22,259, at p. 28,692.

The Union has relied heavily upon the First Circuit's holding in *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029*, 446 F.2d 369 (1st Cir. 1971), but we believe that the decision is inapposite to the present fact situation. Although the court in *Granite State* upheld the right of the union involved to impose fines on strikebreakers for post-resignation activity, it emphasized that a specific set of facts was present which it believed rendered such a result equitable, and it specifically recognized that these considerations were not present with respect to the instant Booster Lodge 405 case.[16] In *Granite State*, the Board conceded that all of the fined employees had voted in favor of the strike in question.[17] It is also important to note that the fines had not been imposed pursuant to a general provision in the union constitution, as here, but rather in accordance with a specific proclamation which had been unanimously adopted by the membership after the work stoppage commenced. *See* 446 F.2d at 370, 372 n. 5. Further-

[16] *See* 446 F.2d at 372 n. 5, wherein the First Circuit distinguished the facts present in the instant case from those present in *Granite State*.

[17] 446 F.2d at 370, n. 2. In the present case, there is no evidence that the disciplined strikebreakers voted to strike.

more, all of those who were disciplined in *Granite State* had been expressly pre-warned of possible punishment for strikebreaking,[18] while the employees with whom we are herein concerned received no such pre-strikebreaking notification. Because of these distinguishing facts, we refuse to apply the rationale of *Granite State* to the instant factual situation.[19] The strong equities which weighed in favor of the union there, are clearly not present here. In fact, their very absence powerfully supports the result which we have accepted.

Since the International Union Constitution and By-laws contained no express restriction upon a member's right to resign, it is clear that the strikebreaker/employees were free to resign at will, subject only to their being bound by any permissible collective bargaining agreement provision limiting this right. *Local Union 621, United Rubber, Cork, Linoleum and Plastic Workers of America*, 167 NLRB 610 (1967); *Communications Workers v. N.L.R.B.*, 215 F.2d 835 (2d Cir. 1954); *N.L.R.B. v. Mechanical and Allied Production Workers, Local 444*, 427 F.2d 883 (1st Cir. 1970). Furthermore, since the resignations all occurred after the termination of the 1963-1965 agreement and before the execution of the new contract, the maintenance-of-membership provision was not applicable to limit this right either. *N.L.R.B. v. Mechanical and Allied Production Workers, Local 444, supra*, 427 F.2d at 884-885; *N.L.R.B. v. Granite State Joint Board, Textile Workers Union, Local 1029, supra*, 446 F.2d at 372. Under these circumstances we concur in the reasoning of the Second Circuit in *Communications Workers* v. *N.L.R.B., supra*, 215 F.2d at 838:

> We agree that the proviso [to § 8(b)(1)(A)] protects the Union's right to make its own rules with re-

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[18] 446 F.2d at 371.

[19] To the extent that the First Circuit's decision in *Granite State* may be read to support Booster Lodge 405's position here, we respectfully decline to follow it.

spect to membership, but assuming, *arguendo*, that a rule wholly prohibiting voluntary resignations would be valid, we think that in the absence of any rule on the subject of voluntary resignation, the *proviso* is inapplicable. Concededly the Union Constitution and by-laws are absolutely silent as to whether a member can voluntarily resign. Hence we think that the common law doctrine on withdrawal from voluntary associations is apposite. Under that doctrine, a member of a voluntary association is free to resign at will, subject of course to any financial obligations due and owing the association. [citations omitted] [20]

For the reasons set out above, we conclude that the Labor Board correctly determined that "the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation [, thus t]he attempted imposition of discipline for subsequent conduct was beyond the powers of the Union." *Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, supra*, 1970 CCH NLRB ¶ 22,259, at p. 28,692.[21]

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[20] We express no opinion herein concerning the legality of any union constitution or by-law provision expressly limiting the right of a member to resign during the period of an ongoing strike. *Compare N.L.R.B.* v. *International Union, U.A.W.*, 320 F.2d 12 (1st Cir. 1963). We similarly intimate no view regarding the legality of any such provision expressly imposing a continuing obligation on any resigning member to refrain from strikebreaking during a work stoppage which was properly commenced prior to the time of the resignation.

[21] It is clear, as the Board has recognized, that the "resignations were effective *upon receipt of notification by the Union.*" *Local 1012, U.E.*, 187 NLRB No. 46, 76 LRRM 1038 (1970) (emphasis supplied). *See Belle-Moc, Inc.*, 81 NLRB 6, 7 (1949); *Koenig Bros.*, 108 NLRB 304 (1954); *N.L.R.B.* v. *Vapor Recovery Systems Co.*, 311 F.2d 782, 785 (9th Cir. 1962). Any questions which may possibly arise concerning the effective dates of particular employee resignations can either be determined by the Board on remand of the reasonableness issue, in accordance with Part II of this opinion, or, if the N.L.R.B. prefers, such

We therefore affirm the Board's finding that the Union violated Section 8(b)(1)(A) of the N.L.R.A. by imposing fines upon employees, and by threatening or attempting enforcement of such fines, because of those employees' *post-resignation* conduct in working at the Company plant during the authorized work stoppage.[22] Since the imposition of fines under such circumstances violated the policies underlying the N.L.R.A. and had effects outside the area of internal Union affairs, they were clearly "coercive" within the meaning of Section 8(b)(1)(A). *See N.L.R.B. v. Marine Workers*, 391 U.S. 418 (1968); *District 50, Local 12419*, 176 NLRB No. 89, 71 LRRM 1311 (1969); *Local 138, International Union of Operating Engineers, AFL-CIO*, 148 NLRB 679 (1964). *See also International Molders and Allied Workers, Local 125*, 178 NLRB 208, 72 LRRM 1049 (1969), enfd., 442 F.2d 92 (7th Cir. 1971).[23] We thus grant enforcement of the

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problems may be left for resolution at the compliance stage or in supplemental proceedings. *United Steelworkers of America, Local 5571* v. *N.L.R.B.*, 130 U.S. App. D.C. 369, 373, 401 F.2d 434, 438 (1968), *cert. denied*, 395 U.S. 946 (1969). *See American Fire Apparatus Co.* v. *N.L.R.B.*, 380 F.2d 1005, 1007 (8th Cir. 1967); *N.L.R.B.* v. *International Longshoremen's Union, Local 12*, 378 F.2d 125, 130 (9th Cir 1967), *cert. denied*, 389 U.S. 846 (1967); *N.L.R.B.* v. *Darling & Co.*, 420 F.2d 63, 66 (7th Cir. 1970).

[22] This would include the Union's effort not only to discipline those employees who had resigned from membership before engaging in any strikebreaking, but also the organization's imposition of fines on those who resigned during the period of their strikebreaking, to the extent that such discipline was imposed as a result of their post-resignation conduct.

[23] The fact that the fines imposed upon the employees for conduct undertaken after they had severed their ties with the Union might not have been collectable in a subsequent collection suit, does not detract from the fact of their coerciveness at the time they were imposed. *See N.L.R.B.* v. *American Bakery and Confectionery Workers, Local 300*, 411 F.2d 1122, 1126 (7th Cir. 1969). *See also Local Union No. 167, Progressive Mine Workers of America* v. *N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

N.L.R.B.'s cease and desist order so far as it concerns the imposition of fines for post-resignation conduct.[24]

II

The Board's Duty to Determine the Reasonableness of Fines

In its decision below, the N.L.R.B. relied upon a companion case, *International Association of Machinists and Aerospace Workers, Local 504* [Arrow Development Co.], 185 NLRB No. 22, 75 LRRM 1008 (1970),[25] in concluding that a fine's "reasonableness" has no effect upon its legality under the N.L.R.A. This conclusion was based upon the Board's belief that Congress did not intend to empower the Labor Board with the authority to examine the severity of union discipline when ascertaining its legality, and it indicated that it thought that local courts were the most logical tri-

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[24] This result also supports the Board's conclusion that the Union fines which were imposed upon the approximately 35 persons who apologized and pledged loyalty, should be confined to 50% of their *pre-resignation* strikebreaking earnings, since any attempt to enforce the discipline with respect to *post-resignation* remuneration could be reasonably construed as an effort to punish the very conduct which we have held the Union may not so regulate. "While it is true that [the Board's] retroactive order might [afford] these employees a better position . . . the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act." *Leeds & Northrup Co.* v. *N.L.R.B.*, 391 F.2d 874, 880 (3rd Cir. 1968). We therefore grant enforcement to that part of the Board's order which limits enforcement of such fines to 50% of pre-resignation earnings, which we believe results in the enforcement of a reasonable fine. Similarly, the prohibition against holding Union office, which, with respect to these persons, was calculated on a pro rata basis reflecting the number of strikebreaking days each worked, must necessarily also be restricted so that the length of such prohibitions will only reflect preresignation activity. *See* expanded discussion of the Board's remedial authority in Part III of this opinion, *infra*.

[25] Appeal is now pending before the Ninth Circuit, *sub nom. David O'Reilly* v. *N.L.R.B.*, No. 26,892.

bunals for the establishment of standards of reasonableness. The Board therefore refused to examine the question of reasonableness in the present case, despite an express determination by the Trial Examiner that the imposed fines were impermissibly excessive. We reject the position of the Board,[26] and remand the case for further proceedings in conformity with the views set out below.[27]

The Board's belief that it does not have the obligation of examining the reasonableness of union fines in Section 8(b)(1)(A) proceedings is based upon a clear misconception of the law and the Supreme Court's relevant decisions. In *Allis-Chalmers*, the Court stated:

> It is no answer that the proviso to §8(b)(1)(A) preserves to the union the power to expel the offending

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[26] We emphasize the fact that in the instant case, the Union not only threatened to utilize court action to enforce the fines imposed, but in several instances, actual collection suits were begun. Under such circumstances, we believe that the reasonableness of the fines in question is highly relevant to the question of their legality under § 8(b)(1)(A). We intimate no view regarding the need for an examination of the reasonableness of disciplinary fines where the only enforcement mechanism contemplated by the union involves the expulsion of the individual from the union.

[27] Although the Union has argued that the aggrieved employees should not have the right to have a Board determination concerning the reasonableness of the fines imposed, due to the fact that they have not exhausted all available internal Union remedies, we reject this contention. An individual need not, in all cases, exhaust all internal union procedures before seeking the services of the N.L.R.B. *See N.L.R.B.* v. *Marine Workers*, 391 U.S. 418 (1968); *Local 138, International Union of Operating Engineers*, 148 NLRB 679 (1964). The imposition of such a requirement in this case concerning the reasonableness issue would not, in our opinion, best serve the interests of justice or further the objectives of the N.L.R.A. The issue here involves public policy and thus transcends the pure internal affairs of the Union. 391 U.S. at 422-428.

member. Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine.*

N.L.R.B. v. Allis-Chalmers Mfg. Co., supra, 388 U.S. at 183 (emphasis supplied). The Court further recognized that "the proviso preserves the rights of unions to impose fines, *as a lesser penalty than expulsion . . .*" 388 U.S. at 191-192 (emphasis supplied).[28] This implicity recognized that, for a disciplinary fine to be less coercive than expulsion from the union, the fine imposed must be a "reasonable" one, for it is intuitively obvious that enforcement of a grossly excessive fine might visit a far greater burden upon an individual than would mere expulsion.[29] The Supreme Court also ex-

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[28] Justice White, in his concurring opinion, observed:

> [S]ince expulsion would in many cases—certainly in this one involving a strong union—be a far more coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method [court action] which may be far less coercive.

388 U.S. at 198 (emphasis supplied). It is also informative to note the express interpretation given to the *Allis-Chalmers* opinion by the dissenting members of the Court: "[T]he Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." 388 U.S. at 200-201 (dissenting opinion of Black, J.) (emphasis supplied).

[29] Even the attorney who argued *Allis-Chalmers* for the union before the Supreme Court has recognized this limitation in the Court's decision. He has indicated that *Allis-Chalmers* only determined that "a union suit to collect a *reasonable fine* imposed on a member for violating a 'no strikebreaking' rule does not violate section 8(b)(1)." Silard, *Labor Board Regulation of Union Discipline After Allis-Chalmers, Marine Workers and Scofield,* 38 GEO. WASH. L. REV. 187, 190 (1969) (emphasis supplied).

pressly recognized this fact in its recent *Scofield* decision, wherein it concluded that the enforcement of a proper union rule "by *reasonable fines* does not constitute the restraint or coercion proscribed by §8(b)(1)(A)." *Scofield* v. *N.L.R.B.*, *supra*, 394 U.S. at 436 (emphasis supplied). The *Scofield* Court emphasized that under *Allis-Chalmers*, "[a] union rule, duly adopted and not the arbitrary fiat of a union officer, forbidding the crossing of a picket line during a strike [is] . . . enforceable against voluntary union members by expulsion or a *reasonable fine*." 394 U.S. at 428 (emphasis supplied). In light of the Court's emphasis on the requirement of "reasonable fines" if a union is to avoid a violation of the Act in these circumstances, we must conclude that the imposition of an unreasonably large fine, at least where the union threatens or actually attempts court enforcement of the fine, may be coercive and restraining within the meaning of section 8(b)(1)(A).

Since the imposition of an unreasonably excessive disciplinary fine is violative of Section 8(b)(1)(A), it is clearly the obligation of the N.L.R.B. to resolve the question of reasonableness where such an issue is appropriately raised. The Board asserts that such a result might cause conflicts between it and state courts which attempt to examine the reasonableness issue in actions to collect such fines. However, we do not believe that this possible problem detracts from the Board's obligation under the N.L.R.A.[30]

We recognize that "state courts have been adjudicating internal union disputes for more than 60 years." Summers, *The Law of Union Discipline: What the Courts Do in Fact*,

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[30] The question of the extent to which union action for enforcement of disciplinary penalties is pre-empted by federal labor law is not before this court, and we intimate no view concerning the resolution of this complex issue. *Compare San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 245 (1959), *with Linn* v. *United Plant Guard Workers, Local 114*, 383 U.S. 53 (1966). *See N.L.R.B.* v. *Allis Chalmers Mfg. Co.*, *supra*, 388 U.S. at 197 n. 37.

70 YALE L.J. 175 (1960).[31] We further acknowledge the fact that "the state courts, in reviewing the imposition of union discipline, find ways to strike down 'discipline [which] involves a severe [monetary] hardship.' "[32] However, these considerations do not relieve the N.L.R.B. of its duties under the N.L.R.A. "[T]he business of the Board, among other things, is to adjudicate and remedy unfair labor practices. Its authority to do so is not 'affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise . . .' §10(a), . . . 29 U.S.C. §160(a)." *N.L.R.B. v. Strong*, 393 U.S. 357, 360 (1969). *See Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S. App. D.C. 12, 15-16, 419 F.2d 314, 317-318 (1969).[33] Furthermore, the fact that

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[31] *See* cases cited 70 YALE L. J. at 175 n. 3. "Unless the rule or its enforcement impinges on some policy of the federal labor law, the regulation of the relationship between union and employee is a contractual matter governed by local law." *Scofield* v. *N.L.R.B., supra*, 394 U.S. at 426 n. 3.

[32] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 193 n. 32, quoting from Summers, *Legal Limitations on Union Discipline*, 64 HARV. L. REV. 1049, 1078 (1951). For some examples of state court willingness to examine the reasonableness of union disciplinary fines, *see: North Jersey Newspaper Guild, Local 173* v. *Rakos*, 110 N.J. Super 77, 74 LRRM 2487 (N.J. Sup. Ct., App. Div. 1970); *L.A. Newspaper Guild, Local 69* v. *Armenta*, 73 LRRM 2078 (Cal. Sup. Ct., App. Dept. 1969); *Walsh* v. *Communications Workers of America*, 75 LRRM 2629, 2632 (Md. Ct. of App. 1970); *McCauley* v. *Federation of Musicians, Local 294*, 26 LRRM 2304 (Pa. Ct. of Com. Pls. 1950).

[33] Although the Union has cited language in *U.O.P. Norplex, Div. of Universal Oil Products Co.* v. *N.L.R.B.*, 445 F.2d 155, 158 (7th Cir. 1971), stating that "[t]he reasonableness of . . . fines is a matter for the state court to determine should the Union seek judicial enforcement of the fines," in support of its contention that this issue is outside the scope of the Board's authority, this statement is clearly not apposite to the present case. The Court was there concerned with whether the subject of internal

some state courts might not permit enforcement of excessive fines in a collection action by the union, does not detract from their coerciveness, or the need for N.L.R.B. action. *N.L.R.B.* v. *American Bakery and Confectionery Workers, Local 300*, 411 F.2d 1122, 1126 (7th Cir. 1969). *See Local Union No. 167, Progressive Mine Workers of America v. N.L.R.B.*, 422 F.2d 538, 542 (7th Cir.), *cert. denied*, 399 U.S. 905 (1970).

Other factors also support the conclusion that Board intervention is authorized in this very limited area, despite the historical activity of state courts and the reluctance of the 80th Congress to interfere in the internal affairs of unions. There is something to be said for having the reasonableness of fines determined by standards that are as nearly uniform as national standards promulgated by the N.L.R.B. can be. Furthermore, access to the Labor Board is more readily available than meaningful access to state courts. Before the Board, the employee is represented by the General Counsel, and the agency bears the expense of the litigation. If the same employee wants a complete resolution of the reasonableness issue in a state court collection action brought by the union, he must be prepared to accept at least some financial burden. "The danger that the legal rights of a disciplined member will go by default because of the cost of asserting them in court is obvious . . ." Summers, *The Law of Union Discipline: What the Courts Do in Fact*, 70 YALE L.J. 175, 220 (1960). We therefore reject the argument that the N.L.R.B. is required to defer to state tribunals with respect to the reasonableness issue. Such "reverse preemp-

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union fines was a mandatory subject for collective bargaining, and it recognized that "even *if the fines were excessive, the remedy would be for the company to file an 8(b)(1)(A) charge against the union*, not to try to convert an otherwise non-mandatory subject of bargaining into a 'term or condition of employment'." 445 F.2d at 158 n. 7 (emphasis supplied). The Boeing Company followed the exact procedure suggested.

tion" would not, in our view, be consonant with the principles underlying the N.L.R.A.[34]

Although the Board has not previously had to examine the reasonableness of union fines, it is not without experience in a related area. Under Section 8(b)(5),[35] it is required to determine whether initiation fess required by a labor organization under a union-security agreement are excessive.[36] The fact that Section 8(b)(1)(A) does not provide the Board with specific standards to be applied in determining the reasonableness of a union fine, while Section 8(b)(5) does include several express standards, does not detract from the N.L.R.B.'s authority under 8(b)(1)(A). *See N.L.R.B. v. Radio and Television Broadcast Engineers Union*, 364 U.S. 573, 582-583 (1961). "Experience and com-

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[34] We emphasize the fact that "[t]he function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board . . ." *N.L.R.B.* v. *Truck Drivers Union*, 353 U.S. 87, 96 (1957). This is the very function which the Board is being asked to perform here.

[35] 29 U.S.C. §158(b)(5) (1970), which provides:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
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> (5) to require of employees covered by an agreement authorized under subsection (a)(3) [, i.e., a union-security provision,] the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount *which the Board finds excessive* or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; (emphasis supplied)

[36] *See, e.g., Longshoremen, I.L.A., Local 1419*, 186 NLRB No. 94, 75 LRRM 1411 (1970), wherein a violation of §8(b)(5) was found. *See also N.L.R.B.* v. *Television & Radio Broadcasting Studio Employees, Local 804*, 315 F.2d 398 (3rd Cir. 1963).

mon sense will supply the grounds for the performance of this job," which we have concluded was implicitly entrusted by Congress to the Board. 364 U.S. at 583.

The Board must remember that a fine imposed for the violation of a legitimate union rule should be viewed as presumptively protective, and therefore privileged, when the amount of the fine, taking into account the character and importance of the ends served by the rule being enforced, is reasonably related to the need for protection. On the other hand, if the amount of the fine is such as to be inordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed upon the member, not in vindication of a legitimate union interest, but rather as a reprisal for his having exercised a statutorily protected right. In the latter situation, as we have previously indicated, the fine would be "coercive" within the meaning of Section 8(b)(1)(A) of the Act. In determining whether an imposed fine is privileged or prohibited, due to its size, many factors may properly be considered by the Board. We shall mention several obvious factors which might be considered on remand, along with others the Board may consider to be applicable.

The reasonableness of a fine would necessarily have to be determined in light of the circumstances leading to its imposition. Such factors as the compensation received by the strikebreakers, the level of strike benefits made available to the striking employees, the individual needs of the persons being disciplined, the detrimental effect of the strikebreaking upon the effectiveness of the strike effort, the length of time of the work stoppage, the strength of the particular union involved, the availability of other less harsh union remedies, and many other similar considerations would clearly be relevant.

One additional consideration is worthy of mention. In its original *Scofield* decision, 145 NLRB 1097, 1104 (1964), the Board expressly indicated that a union had no right to

impose any penalty which would "impair the member's status as an employee." This prohibition against union disciplinary action adversely affecting an employee's employment status has been approved by the Supreme Court. *See N.L.R.B. v. Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 195; *Scofield v. N.L.R.B., supra*, 394 U.S. at 423, 428. While this principle clearly prohibits a union from seeking the suspension or termination of an employee by his employer due to his strikebreaking,[37] its implications may have further application which might be relevant to the present case. Where a disciplinary fine is unreasonably excessive, it may possibly affect the employee's employment status as adversely—and possibly even more adversely—as an illegally obtained employment suspension. On remand, the Board might also consider this protective policy of the Act in determining the reasonableness of the fines in question under Section 8(b)(1)(A).[38]

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[37] *See* 29 U.S.C. § 158(b)(2) (1970), which provides, *inter alia:*

> (b) It shall be unfair labor practice for a labor organization or its agents—
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> * * * * * * * *
>
> (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) . . . .

29 U.S.C. § 158(a)(3) (1970), provides *inter alia:*

> (a) It shall be an unfair labor practice for an employer—
>
> * * * * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

[38] We, of course, recognize that Section 8(b)(2) was enacted to prevent a union from improperly interfering with an individual's employment relationship *through his employer*. However, this does not detract from the fact that this provision evidences a Congressional desire to protect an employee from any unreasonable adverse affect on his employment status by a labor organization. *See N.L.R.B.* v. *Allis-Chalmers Mfg. Co., supra*, 388 U.S. at 195; *Scofield* v. *N.L.RB, supra*, 394 U.S. at 123, 128.

III

Labor Board Remedy

Although we are remanding this case to the N.L.R.B. for further consideration of the reasonableness question, it is apparent that the other aspects of the Board's decision below should be immediately affirmed. As was noted earlier in this opinion, the cease and desist order prohibiting further Union action pertaining to post-resignation strike-breaking conduct is granted enforcement. A more difficult question arises with respect to the affirmative aspects of the Board's decision.

"In § 10(c) of the Act [39] Congress has given the Board broad power to fashion remedies to effectuate the policies of the Labor Act. So long as the Board exercises responsibility in its judgment, courts should not interfere with its remedy, since this is 'peculiarly a matter for administrative competence.' Phelps Dodge Corp. v. NLRB, 313 U.S. 177, at 194 . . . (1941)." [40] "The Board's power to fashion remedies places a premium upon agency expertise and experience, and the broad discretion involved is for the agency and not the court to exercise." *Amalgamated Clothing Workers of America v. N.L.R.B.*, 125 U.S. App.D.C., 275, 281, 371, F.2d 740, 746 (1966).[41]

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[39] 29 U.S.C. § 160(c) (1970) authorizes the Board to require the perpetrator of an unfair labor practice "to take such affirmative action . . as will effectuate the policies of this [Act] . . ."

[40] *Office and Professional Employees International Union, Local 425* v. *N.L.R.B.*, 136 U.S. App.D.C. 12, 19-20, 419 F.2d 314, 321-322 (1969). *See Frank Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 704 (1944); *Fibreboard Paper Products Corp.* v. *N.L.R.B.*, 379 U.S. 203, 215-217 (1964). *See also N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

[41] *See* cases cited 125 U.S. App.D.C. at 281 n. 5, 371 F.2d at 746 n. 5.

With these considerations in mind, we clearly must affirm that part of the Board's order which requires the Union to reimburse the approximately 35 employees who apologized and pledged loyalty, thereby obtaining a reduction in their respective penalties, for any amounts paid which were based upon post-resignation strikebreaking earnings.[42] We similarly affirm that portion of the order requiring the total reimbursement of any fines paid by employees who effectively resigned before engaging in any strikebreaking activity.

With respect to the Board's order as it relates to the remaining employees who resigned, the Board established a reimbursement formula which pro rated each employee's respective fine, thereby limiting the collectable portion to that part which reflects the amount of pre-resignation conduct. It obviously believed that this was the most reasonable manner in which to rectify the effects of the Union's unfair labor practice with respect to these persons.

The utilization of remedial formulas has been approved by the Supreme Court. *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344 (1953). Keeping in mind our limited review function, we are unable to conclude that "the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). "While it is true that [such] a retroactive order might afford the employees a better position . . . the Board can hardly be said to be effectuating policies beyond the purposes of the Act by resolving the doubt against the party who violated the Act." *Leeds & Northrup Co.* v. *N.L.R.B.*,

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[42] *See* n. 24, *supra*, for further discussion of the remedy pertaining to these persons.

391 F.2d 874, 880 (3rd Cir. 1968).[43] We therefore must affirm this portion of the Board's affirmative reimbursement order.

The case is remanded to the Labor Board for further consideration of the questions relating to the reasonableness of the fines imposed by the Union.

So Ordered.

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[43] We are cognizant of the fact that the Union's $450.00 fine was imposed upon all strikebreakers—except those who apologized and pleaded loyalty—regardless of the number of days of strikebreaking engaged in by each. Although the Union argues that this fact indicates that no pro rata reduction should have been required by the Board with respect to these employees, we recognize the N.L.R.B.'s obvious desire to formulate an affirmative order would rectify the Union's improper attempt to punish post-resignation conduct. We cannot conclude that the Board has abused its broad discretionary authority in this area. *See N.L.R.B.* v. *Seven-Up Bottling Co.*, 344 U.S. 344 (1953).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 15-CB-779

Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO and The Boeing Company

Decision and Order

On December 30, 1968, Trial Examiner Ramey Donovan issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in certain unfair labor practices and recommending that it cease and desist therefrom, and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel, the Charging Party, and the Respondent each filed exceptions to the Decision, together with supporting briefs. The Charging Party filed a reply brief. Subsequently in response to an invitation of the Board, the Charging Party and the Respondent filed supplemental briefs. In response to the same invitation, statements of position were filed by the National Association of Manufacturers, and by the American Federation of Labor and Congress of Industrial Organizations, joined by the International Brotherhood of Teamsters and the International Union, UAW, as *amici curiae*.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The Board has considered the Trial Examiner's Decision, the exceptions and briefs, the reply brief, the supplemental briefs, the statements of position *amici curiae*, and the entire record in the case. The Board adopts the Trial Examiner's findings of fact, but adopts his conclusions and recommendations only to the extent that they are consistent with the decision herein.

The essential facts of this case are not in dispute. Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, hereinafter called IAM or the Union, and Boeing were parties to a collective-bargaining agreement effective from May 16, 1963 through September 15, 1965.[1] Upon the expiration of the contract, the Union commenced a lawful strike against Boeing at its Michoud plant in New Orleans, Louisiana, and at various other locations. The strike lasted 18 days. On October 2, 1965, a new contract was signed. The strikers returned to work on the following day. Both contracts contained maintenance-of-membership clauses, which required new employees to notify both the Union and the Employer of their desire not to join the Union within 40 days of accepting employment.

During the strike period, some 143 employees of a unit of approximately 1900 production and maintenance workers crossed the picket line and reported for work. All had been members of the Union during the contract period. One group of strikebreaking employees, numbering some 24, made no attempt to resign from the Union. The remaining 119 strikebreaking employees submitted their voluntary resignations, in writing, to both the Union and the Employer.[2] Many

[1] At the time of the execution of the 1963 agreement, Booster Lodge 405 was not in existence. Boeing's Michoud, Louisiana, plant was considered a "Remote Location" unit, identified with the "Primary Location" unit at Seattle-Renton, Washington. Production and maintenance employees in the Michoud unit were represented by Aeronautical Industrial District Lodge No. 751, IAM, AFL-CIO, Seattle, a signatory to the contract with Boeing. Booster Lodge No. 405 came into existence sometime later in 1963, but the contract was not modified to reflect this event.

[2] The Union objects to the fact that notices of resignation were sent to District Lodge 751 rather than to Booster Lodge 405. However, since Booster Lodge 405 was not a party to the original contract, as explained in footnote 1 *supra*, it would appear that employees who notified District Lodge 751 were attempting to comply with contractual requirements. Moreover, District Lodge 751 notified Booster Lodge 405 of all resignations.

resigned from membership prior to reporting for work during the strike. Others resigned during the course of the strike, but returned to work before submitting their resignations.[3] All resignations were submitted after the expiration of the original contract and before the signing of the new one. All were submitted prior to the imposition of discipline by the Union.

In late October or early November 1965, the Union notified all strikebreaking employees that charges had been preferred against them under the International Constitution for "Improper Conduct of a Member" in "accepting employment . . . in an establishment where a strike . . . exists." Employees were advised of the dates of their trials, which were to be held even in their absence, and of the availability of union-member counsel. Prior to the strike, the Union had not warned members about the possible imposition of disciplinary measures. However, the IAM constitution provides that members found guilty of misconduct after notice and a hearing are subject to "reprimand, fine, suspension, or expulsion from membership, or any lesser penalty or combination." The constitution sets no maximum dollar limitation on fines.

Fines were imposed on all strikebreaking employees, regardless of whether, or when, they had resigned from the Union. Employees who did not appear for trial were fined $450, as were those who appeared and were found guilty. The fines of employees who appeared for trial, apologized, and pledged loyalty to the Union were reduced to 50 percent of strikebreaking earnings. The level of fines was set by the union membership. There is no indication of the

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[3] Four-hundred-and-fifty dollar fines were imposed on 108 employees. Of these, 61 had resigned their union membership prior to reporting for work during the strike, and others resigned during the course of the strike. Reduced fines were imposed on 35 employees. The record as to the timing of their resignations is not clear.

method of computation. Strikebreaking employees earned between $2.38 and $3.63 per hour, or between $95 and $145 per 40-hour week. In some instances, earnings during the strike were supplemented by the inclusion of bonus or premium rates for weekends and overtime.

Reduced fines have been paid in some instances. Payments have averaged $40. None of the $450 fines has been paid. The Union has sent out written notices that the matter has been referred to an attorney for collection, that suit will be filed upon nonpayment of fines, and that reduced fines will be increased for $450 in the event of nonpayment. The Union has filed suit against nine individual employees to collect the fines (plus attorney's fees and interest). The outcome of the suits has not been determined.

A principal issue in this case is the legality of the Respondent's imposition of disciplinary fines upon individuals who had resigned from the Union before engaging in the conduct for which the discipline was imposed. The complaint alleges, and the Trial Examiner found, that the Respondent's action in fining employees in this category violated Section 8(b)(1)(A) of the Act. We agree with the Trial Examiner's conclusion.[4] However, as the Trial Examiner has not fully spelled out his reasoning in this regard, and in light of the views of our dissenting colleague, we believe that further explication of our reasoning is appropriate here.

Under Section 8(b)(1)(A) of the Act, it is an unfair labor practice for a labor organization to "restrain or coerce employees in the exercise of rights guaranteed in Section 7." Included among those rights is the right to refrain from

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[4] The Trial Examiner's reference to a "compounded" violation of Section 8(b)(1)(A) perhaps implies that the violation is merely derivative. On the contrary, we find, as spelled out more fully herein, that the very imposition of a fine on nonmembers violates the Act, regardless of the amount of the fine.

engaging in any of the protected concerted activities enumerated at the beginning of Section 7.

The levy of a fine is calculated to force an individual both to pay money and to engage in particular conduct against his will. This is true regardless of the ultimate collectibility of the fine. A man who is held up at gunpoint is coerced whether or not the gun is loaded. As with the levy of a fine, the coercion lies in the calculated threat and, as has been held, the "argument that the fines imposed were not collectible in a court of law, even if accepted is beside the point."[5] The imposition of a fine has immediate coercive consequences. Faced with the possibility of action against him, the employee may well be, for practical purposes, impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict.[6] Or, should he choose to take that risk, he will find it necessary to hire counsel whose services he ordinarily would not require.

The Board has long recognized that a fine is inherently coercive.[7] Yet in situations where a union imposes disciplinary fines on its *members* the Board has held that the union does not violate Section 8(b)(1)(A).[8] The basis of the Board's holdings in these early fine cases was the proviso

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[5] See *N.L.R.B.* v. *American Bakery and Confectionery Workers' Local Union 300*, 411 F.2d 1122, 1126, (C.A. 7), enfg. 167 NLRB 596.

[6] We do not share the confidence of our dissenting colleague in the ability of the ordinary employee to evaluate the ultimate legal consequences of the union's act. Nor would we require him to attempt to do so.

[7] See e.g. *Minneapolis Star & Tribune Co.*, 109 NLRB 727, 738.

[8] *Ibid. See also Local 283, United Automobile, Aircraft & Agricultural Implement Workers of America, UAW-AFL-CIO (Wisconsin Motor Corp.)*, 145 NLRB 1097; *Local 248 et al., United Automobile, Aerospace & Agricultural Implement Workers of America, AFL-CIO (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67.

to Section 8(b)(1)(A), which exempts "the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership" from the coverage of that section. Although a union's membership rules may well be coercive, their enactment is specifically protected by the Act. In *Minneapolis, supra,* the Board construed the levy of the fine as the prescription of a rule with respect to the retention of union membership, and held that the union's conduct, which was protected by the proviso, therefore did not violate Section 8(b)(1)(A).

In affirming the Board's conclusions in *Allis-Chalmers,* the Supreme Court held that the body of Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in imposing and enforcing a fine upon its members for crossing an authorized picket line.[9] Thus, the Court found it unnecessary to pass on the Board's holding that the proviso protected the union's conduct. Nevertheless, the basis of the Court's holding was the underlying relationship between the union and its members. Throughout the opinion, the Court emphasized the right of unions to regulate their own internal affairs. Reference was made to the "contract theory" of union membership. And, finally, the Court cited the proviso to Section 8(b)(1)(A) as offering "cogent support for an interpretation of the body of Section 8(b)(1)(A) as not reaching the opposition of fines and attempts at court enforcement."

The significance of the membership relationship is that it establishes the union's authority over its members. In joining a union, the individual member becomes a party to a contract-constitution. Without waiving his Section 7 right to refrain from concerted activities, he consents to the possible imposition of union discipline upon his exercise of that right.[10] But the contract between the member and

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[9] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175.

[10] The power to discipline recalcitrant members is essential to the union's self-preservation. This coercive power is protected by the proviso to Section 8(b)(1)(A).

the union becomes a nullity upon his resignation. Both the member's duty of fidelity to the union and the union's corresponding right to discipline him for breach of that duty are extinguished.

In the case at bar, the Union's right to discipline employees terminated upon the employees' submission of their letters of resignation.[11] The attempted imposition of discipline for subsequent conduct was beyond the powers of the Union.[12] It was not consented to by the employees. Nor, in our view, was it protected by the proviso to the Act.

The holding in *Allis-Chalmers* was carefully restricted to the facts of that case. The Court expressly refused to pass on the legality of the imposition of a fine upon "limited members" of the union[13] It appears to us that in this reservation there was the implication that such a fine when levied against nonmembers constitutes a form of restraint and coercion proscribed by Section 8(b)(1)(A). The decisions in two subsequent fine cases reinforce that implication.

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[11] The Union takes the position that voluntary resignation from its ranks is impossible of achievement because its constitution and by-laws set forth no procedure for such resignations. As this argument is contrary to long-standing Board precedent, we reject it here. See *Communications Workers of America, CIO (New Jersey Bell Tel. Co.)*, 106 NLRB 1322, enfd. 215 F.2d 835 (C.A. 2); *Local Union No. 621, United Rubber, Cork, Linoleum & Plastic Workers of America, AFL-CIO (Atlantic Research Corp.)*, 167 NLRB 610; *District Lodge 751, International Association of Machinists & Aerospace Workers, AFL-CIO (Boeing Co.)*, 173 NLRB No. 71. Moreover, as indicated *infra*, the Supreme Court in the *Scofield* case expressly sanctioned the strategy of leaving the union to avoid discipline.

[12] The Union's disciplinary authority was, as we hold, limited to conduct engaged in during the period of membership.

[13] While the court did not specifically refer to the fining of nonmembers, the cited reservation indicates the relevance of the membership issue.

In its recent *Scofield* opinion,[14] the Supreme Court summarized its construction of Section 8(b)(1)(A) as follows:

> [The section] leaves a union free to enforce a properly-adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced *against union members* who are free to leave the union and escape the rule. [Emphasis supplied.]

This suggests that the prohibitions of Section 8(b)(1)(A) encompass union rules which do not conform with the enumerated qualifications. Included in this latter category is a rule enforced against nonunion members. By observing that members could "leave the union and escape the rule," the Court seems to have envisaged the possibility that union members could, indeed, resign membership and avoid discipline.

In the *Shipbuilding Workers* Case,[15] the Supreme Court found unlawful a union's attempt to discipline members for filing charges with this Board before exhausting their intra-union remedies. The Court construed Section 8(b)(1)(A) as assuring a union freedom of self-regulation only "where its legitimate internal affairs are concerned." But the imposition of discipline upon nonmembers can hardly be deemed an internal affair.

Our dissenting colleague treats *Allis-Chalmers* as if it existed in a vacuum, overlooking subsequent decisions and the statutory provisions themselves. But to extend the *Allis-Chalmers* doctrine beyond the perimeters of the situation there involved is to emasculate the provisions of Section 8(b)(1)(A). Such a result can hardly have been intended by the Supreme Court. It should not be reached here. In the interplay between the statutory policy to prevent coer-

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[14] *Scofield, et al.* v. *N.L.R.B.*, 394 U.S. 423.

[15] *N.L.R.B.* v. *Marine & Shipbuilding Workers*, 391 U.S. 418.

cion of employees for exercising Section 7 rights on the one hand, and the policy to permit unions to guide their internal affairs and determine their membership qualifications on the other, the former must prevail where the membership relation which justifies the latter is terminated.

For the foregoing reasons, we find that the Respondent violated Section 8(a)(1)(A) of the Act by imposing disciplinary fines upon resigners from its ranks, for acts committed after their resignations. We shall order the Respondent to cease and desist from such conduct, including attempts to collect the illegal fines through court proceedings.

Also at issue in this case is the legality of the Respondent's imposition of disciplinary fines upon two other categories of strike-breaking employees, those who crossed the picket line without resigning from the union, and those whose resignations were submitted after the commencement of strikebreaking activities but prior to the initiation of disciplinary action against them. The legality of the imposition of discipline upon members for conduct engaged in during the period of membership is clear.[16] Accordingly, we find that the Respondent did not violate Section 8(b)(1)(A) by fining the nonresignees. Nor, in our opinion, does the Respondent's failure to exercise its disciplinary authority with respect to the second group until after the submission of

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[16] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, *supra*. As a majority of the Board (Members Fanning, Brown, and Jenkins), would find that the legality of union fines does not depend on their reasonableness, the Board does not adopt the Trial Examiner's findings, conclusions and recommendations on that issue. See *Arrow Development Corp.*, 185 NLRB No. 22, issued this day. For the reasons stated in his dissenting opinion in the *Arrow* case, Chairman McCulloch would examine the amount of the fines to determine their reasonableness in those situations where the union's imposition thereof and threatened or actual court action to collect such fines would in all other respects be lawful. Where expulsion from membership is clearly the only available method of enforcement, he would consider the size of a fine irrelevant.

their resignations affect the legality of its action. As the source of the Union's disciplinary authority lies in the contractual relationship between the organization and its members, it is to the rules of contract law that we turn in evaluating the Union's conduct. The provisions of a contract are enforceable, and a cause of action can be brought upon them, even after the expiration or termination of the agreement. The rights and duties created by an agreement are extinguished only prospectively by the termination thereof. Thus the termination of some employees' membership here did not affect the Union's subsequent assertion of rights which had accrued to the Union during their earlier period of membership, such as the right to discipline the employees for prior strikebreaking. The effect of these employee's resignations was only to extinguish the Union's future authority over them.

Accordingly, we further find that the Respondent did not violate Section 8(b)(1)(A) of the Act by fining former members for misconduct engaged in prior to their resignations from among its ranks. However, this conclusion does not legitimize the imposition of discipline for conduct engaged in after the resignations. We shall order the Respondent to cease and desist from such action, and to remit a prorata portion of the fine, so that what remains reflects only preresignation conduct.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, Booster Lodge No. 405, International Association of Machinists and Aerospace Workers, AFL-CIO, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Restraining or coercing employees, who had resigned from and who were no longer members of the Union,

in the exercise of their rights guaranteed in Section 7 of the Act, by imposing fines against such employees because of their post-resignation conduct in working at the Michoud plant during the September 1965, strike, or by threatening to seek or seeking court enforcement of such fines.

(b) In any like or related manner, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action to effectuate the policies of the Act:

(a) Reimburse or refund to any employees, described in paragraph 1(a) of this Order, who have paid fines under the circumstances described in that paragraph, the amount of said fines imposed because of post-resignation conduct in working at the plant.

(b) Post at its office and meeting hall and at the Michoud, Louisiana plant of the Boeing Company, if the Company is willing, copies of the attached notice, marked "Appendix."[17] Copies of said notice, on forms provided by the Regional Director for Region 15, shall, after being signed by an authorized representative, shall be posted at the aforementioned locations, in conspicuous places, including all places where notices to employees are customarily posted, and reasonable steps shall be taken to insure that said notices are not altered, defaced, or covered by other material.

(c) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

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[17] In the event this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted pursuant to a Judgment of the United States Court of Appeals enforcing an Order of the National Labor Relations Board."

IT IS FURTHER ORDERED that those portions of the complaints as to which no violation has been found be, and they hereby are, dismissed.

Dated, Washington, D. C., August 27, 1970.

JOHN H. FANNING,	Member
FRANK W. MCCULLOCH,	Member
HOWARD JENKINS, JR.,	Member

(Seal)

NATIONAL LABOR RELATIONS BOARD

Member Brown, concurring in part and dissenting in part:

I join with my colleagues in dismissing the allegations of the complaint with respect to the imposition of discipline upon members for conduct engaged in during their period of membership. However, I would also dismiss the remaining allegations concerning the imposition of fines upon purported resigners from the Union.

My colleagues' disposition of this question is predicated upon the premise that an employee, faced with the threat of a union fine, "may well be impelled to forego his statutory right not to honor the Union's picket line rather than risk involvement in a lawsuit whose outcome he cannot predict." But this is what *Allis-Chalmers* was all about. There, a union fine, or the threat of it, expressly designed to force employees to "forego [their] statutory right not to honor the Union's picket line" was nevertheless held not to violate Section 8(b)(1)(A) even though such a fine was collectible, or collected, in court. The Supreme Court reasoned that 8(b)(1)(A) was not intended to apply to this kind of coercion. If, as is the case here, a Union does not violate 8(b)(1)(A) by imposing or threatening to impose a collectible fine, it is difficult to see how a presumably uncollectible fine can be violative of that Section. Even if, as the majority reasons, the employee concerned may not be sufficiently knowledgeable to evaluate the Union's fine

as "un-collectible," and thus feel completely free to cross the picket line with impunity, he is plainly no more coerced than the full-fledged member.

A further consideration, ignored by my colleagues, impels me to this view. Each of the employees involved here, and in all other situations of which I am aware, was a member of the Union in all senses of the word before the strike began. Thus the fealty owed by a member to his union in effect came into play when the strike was authorized and began, and a "resignation" at that point was already a disloyal action from the standpoint of the Union and his fellow members. Moreover, I cannot conceive of a case arising where a union would "fine" someone who had never been its member at all. It is only because the employees here were, in the eyes of the Union, and pursuant to the Union's constitution and bylaws, still Union members, that the fines would have any impact at all upon them. In this respect, whether employees are still members of the Union for purposes of imposition of a Union fine, the proviso to 8(b)(1)(A), in express terms, applies to a union's rules for acquisition or retention of membership.[18]

For all these reasons, I would find no violation of Section 8(b)(1)(A) of the Act in a Union's fining a nonmember or a purported nonmember.

Dated, Washington, D. C., August 27, 1970.

GERALD A. BROWN, Member

NATIONAL LABOR RELATIONS BOARD

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[18] The cases cited by my colleagues in footnote 11 concern a Union's application of its membership rules to his job tenure, and thus are inapposite to the instant situation, where the rules pertain solely to another internal union matter.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Case 20-CB-1947

INTERNATIONAL ASSOCIATION OF MACHINISTS
AND AEROSPACE WORKERS, AFL-CIO
LOCAL LODGE NO. 504, (ARROW DEVELOPMENT CO.)

AND

DAVID O'REILLY, AN INDIVIDUAL

Decision and Order

Upon a charge duly filed on November 14, 1968, by David O'Reilly, an individual, the General Counsel of the National Labor Relations Board, by the Regional Director of Region 20, issued a Complaint and Notice of Hearing on February 26, 1969, against International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504. The complaint alleged that the Respondent Union had engaged in and was engaging in unfair labor practices within the meaning of Section 8(b)(1)(A) of the National Labor Relations Act, as amended, by imposing a fine of $500 against David O'Reilly for crossing a picket line established by Respondent at Arrow Development Co., and by attempting to collect said fine. On March 3, 1969, Respondent filed an answer denying the commission of any unfair labor practices.

On various dates between April 14, 1969, and April 21, 1969, the parties executed a Stipulation of Facts and a Motion to Transfer Proceeding to the Board by which they waived a hearing before a Trial Examiner and the issuance of a Trial Examiner's Decision and Recommended Order and agreed to submit the case to the Board for findings of fact, conclusions of law, and an order, based upon a record consisting of the Stipulation of Facts and the exhibits attached thereto.

On April 28, 1969, the Board approved the stipulation of the parties and ordered the case transferred to the Board, granting permission for the filing of briefs. Thereafter, the General Counsel, Charging Party, and Respondent filed briefs, and the General Counsel and Respondent filed answering briefs.

Upon the basis of the stipulation, the briefs, and the entire record in this case, the Board makes the following:

Findings of Fact

I. Jurisdiction

Arrow Development Co., hereinafter also referred to as Arrow, is a California corporation with its principal place of business in Mountain View, California, where it is engaged in the manufacture and wholesale distribution of rides for use in amusement parks. During the past year, in the course and conduct of its business, Arrow shipped goods valued in excess of $50,000 directly to customers located outside the State of California.

We find that Arrow is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The Labor Organization Involved

International Association of Machinists and Aerospace Workers, AFL-CIO, Local Lodge No. 504, is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Facts*

Respondent has represented Arrow employees for a number of years. The most recent collective-bargaining contract, which contained a union-security clause requiring membership in the Union as a condition of employment, was op-

erative for the period April 1, 1967, to March 31, 1968. On March 31, Respondent held a meeting, attended by David O'Reilly, at which a strike was authorized by vote of the membership. The strike began on April 1, and lasted until April 29, when a new agreement between Arrow and the Union was reached. During the 4-week period of the strike, O'Reilly crossed the picket line and continued to work, earning $610.62 (net earnings were $511.33) for this period.

At all times material herein, O'Reilly has been a member of the Union. On April 29, 1968, he was notified by the Union that charges had been filed against him for crossing the picket line and working for Arrow during the strike. O'Reilly did not attend the subsequent trial and, in his absence, Respondent's trial committee found him guilty and recommended that he be fined $250. Thereafter, at a regular membership meeting, Respondent's members concurred in the verdict of the committee and voted to fine O'Reilly $500. O'Reilly was so notified.

On August 2, 1968, Respondent brought suit against O'Reilly in the Municipal Court for the San Jose-Milpitas-Alviso Judicial District, County of Santa Clara, State of California, to collect the fine. On November 15, the Union was awarded a judgment for $528.[1] Since that date, Respondent has attempted to collect on the judgment by garnisheeing of O'Reilly's wages.

B. *Contentions of the Parties*

In *Allis-Chalmers*,[2] the Supreme Court held that a union does not violate Section 8(b)(1)(A) by imposing fines against its members for failure to honor an authorized picket line, and by attempting to enforce the fines through court action, for the reason that 8(b)(1)(A) was not in-

[1] Five hundred dollars on the debt, $26.50 in costs, and $1.50 in fees for issuance of the writ of execution.

[2] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175.

tended by Congress to prohibit a labor organization from imposing such fines.[3] The fines in that case ranged from $20 to $100. In *Scofield* v. *N.L.R.B.*,[4] the union had imposed fines of $50 and $100 on members who violated its rule (imposing a ceiling on production for which members could accept immediate piecework pay). In holding the union's foregoing conduct had not violated the Act, the Supreme Court observed, *inter alia*, that there was no showing that the fines were unreasonable in amount. The General Counsel urges in the instant case that "The Supreme Court has thus indicated that a union may violate Section 8(b)(1)(A) if it imposes an unreasonable fine on its members." According to General Counsel, regardless of the reason for the assessment once it is shown that a fine is unreasonably large, "the excessiveness of the . . . penalty makes . . . [the] conduct an unprotected restraint upon employees," since such a penalty necessarily coerces employees with respect to the exercise of their Section 7 right to refrain from assisting a labor organization. Thus, a fine, such as the one in the instant case, which equals or exceeds wages earned during a strike is a total restraint upon an employee's election to work is confiscatory, and, therefore, presumptively unlawful.[5] Finally, General Counsel argues that the Board should not permit the state courts to become the sole arbiters of

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[3] The Board (149 NLRB 67) had reached the same result by application of the 8(b)(1)(A) proviso, a holding which the Supreme Court found unnecessary to pass upon.

[4] 394 U.S. 423.

[5] As analogical support for his position, General Counsel directs the Board's attention to its decision in *Charles S. Skura*, 148 NLRB 679 (approved by the Supreme Court in *N.L.R.B.* v. *Marine & Shipbuilding Workers*, 391 U.S. 418), which assertedly establishes the proposition that union imposition of fines on its members may, in some circumstances, constitute restraint and coercion. However, in that case, it was the reason for the discipline (fining of members who had filed charges with the Board) rather than its severity which made the discipline unlawful.

the question of whether or not a fine is reasonable (an issue which those courts will face in entertaining union suits to enforce fines) because a uniform national policy is required.

The Charging Party, in addition to the contentions advanced by General Counsel, urges the following considerations:

1. The strike vote was not by secret ballot.[6]

2. The Union constitution denies a member the right to select counsel of his choice to represent him during union disciplinary proceedings.[7]

3. The Union attempted to enforce the fine by engaging in conduct prohibited by Section 8(b)(2).[8]

4. After securing a judgment, the Union served the Employer with garnishment papers requiring the Employer to deduct 50 percent of the Charging Party's wages until the fine was satisfied.[9]

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[6] We need not determine whether or not the vote was by secret ballot; the balloting procedure utilized for the strike vote in this case is an internal union matter not governed by any provisions of the National Labor Relations Act.

[7] The Union constitution provides that a member must select his attorney from among the members of the Union. The Board will not review the procedural regularity of this internal union disciplinary proceeding.

[8] The alleged 8(b)(2) conduct has been the subject of a separate settlement agreement, approved by the Regional Director, and thus is not before us in the instant case.

[9] By serving the Employer with garnishment papers, after securing a judgment, the Union was apparently following applicable procedures under California law for collection on a judgment. These procedures are not subject to our review. If the original imposition of the fine was lawful under this Act, and the suit to enforce the fine was also lawful, then it necessarily follows that the Union may avail itself of judgment collection procedures under state law.

5. The Charging Party was not a voluntary union member, but joined the Union solely because of the requirements of the then operative contract union-security clause.[10]

Respondent urges that *Allis-Chalmers* establishes that a union's action in fining a member for crossing a lawful picket line does not conflict with any policy of the Act and, therefore, the amount of the fine is necessarily an internal union matter, removed from Board jurisdiction by the 8(b)(1)(A) proviso. Further, Respondent contends, the fine in this case is reasonable as the Union, in fining the Charging Party an amount roughly equal to his net strike-breaking earnings, has merely deprived him of the fruits of breaking the union rule. Employees who obeyed the rule suffered a comparable loss. Additionally, according to Respondent, a fine may lawfully serve a penal function and, in that case, may be greater "than the monetary benefit that the wrongdoer derives from his offense."[11]

C. *Conclusion*

As early as 1954, the Board held in *Minneapolis Star and Tribune Company*[12] that a union had not violated the Act

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[10] In *Allis-Chalmers*, a form of union-security clause was also in effect, and it was urged that membership was a result of this requirement and not voluntary choice. The Supreme Court held that the relevant question was not what motivated full membership, so long as full membership existed in fact. The Court stated: "Allis-Chalmers offered no evidence in this proceeding that any of the fined employees enjoyed other than full union membership. We will not presume the contrary." We regard this holding as dispositive of the issue raised by the Charging Party herein.

[11] Respondent also urges that the complaint is defective because it does not specifically allege that the $500 fine is unlawful because the amount is unreasonable. Respondent further contends that the complaint should be dismissed because of the Charging Party's failure to exhaust internal union procedures. In view of our disposition of the case, we need not pass upon these contentions.

[12] 109 NLRB 727.

by imposing a fine of $500 on a member for his failure to perform picket duty during the course of a 1-week strike. The Board concluded that ". . . the proviso to Section 8(b)(1)(A) precludes any such interference with the internal affairs of a labor organization." The Board adhered to this rationale in its more recent decisions in *Wisconsin Motor Corporation*[13] and *Allis-Chalmers Manufacturing Company*,[14] both involving fines and judicial proceedings to enforce the fines. In *Allis-Chalmers* the Board held:

> Here too the Respondents have properly maintained the distinction between treatment of the individual as a member of the Union and treatment of him as an employee. They have imposed the fine only on their own members. It is not alleged that the Respondents ever attempted to affect the jobs or working conditions of any of the fined individuals. Nor is it alleged that the rule prohibiting members from crossing a picket line during a strike is not the legitimate concern of a union or properly the subject matter of internal discipline. It may be said then that the Respondents were engaged only in prescribing and enforcing their own rules with respect to the acquisition or retention of membership. Since, under the proviso, Section 8(b)(1)(A) does not impair the right of a labor organization to do this, it follows that the Respondents did not violate that section.

In affirming the Board's conclusions in *Allis-Chalmers*, the Supreme Court reviewed the legislative history underlying the enactment of the Taft-Hartley Act and held that Section 8(b)(1)(A) was not intended to reach the conduct of a labor organization in fining its members for crossing

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[13] 145 NLRB 1097.

[14] 149 NLRB 67.

an authorized picket line, and seeking court enforcement of those fines.[15] The Court held at 195:

> Thus this history of congressional action does not support a conclusion that the Taft-Hartley prohibitions against restraint or coercion of an employee to refrain from concerted activities included a prohibition against the imposition of fines on members who decline to honor an authorized strike and attempts to collect such fines. Rather the contrary inference is more justified in light of the repeated refrain throughout the debates on § 8(b)(1)(A) and other sections that Congress did not propose any limitations with respect to the internal affairs of unions, aside from barring enforcement of a union's internal regulations to affect a member's employment status.

In *Wisconsin Motor*,[16] the Court reaffirmed its holding in *Allis-Chalmers*. It further noted that the Board's decision in *Skura*,[17] and its own decision in *Marine Workers*,[18] establish that if a union rule "invades or frustrates an overriding policy of the labor laws the rule may not be enforced, even by fine or expulsion, without violating § 8(b)(1)." The net effect of the two lines of cases, said the Court, is that:

> Under this dual approach, § 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union interest, impairs no policy Congress has imbedded in the labor laws, and is reasonably enforced against union members who are free to leave the union and escape the rule.

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[15] The Court's rationale made it unnecessary to test the Union's conduct against the 8(b)(1)(A) proviso, as the Board had done.

[16] *Scofield* v. *N.L.R.B.*, footnote 4, *supra*.

[17] Footnote 5, *supra*.

[18] *Id.*

The Court concluded:

> The union rule here left the collective bargaining process unimpaired, breached no collective contract, required no pay for unperformed services, induced no discrimination by the employer against any class of employees, and represents no dereliction by the union of its duty of fair representation. In light of this, and the acceptable manner in which the rule was enforced, vindicating a legitimate union interest, it is impossible to say that it contravened any policy of the Act.

Thus, the Court's synthesis of the *Allis-Chalmers* and *Skura* lines of cases makes the initial distinction that 8(b)(1)(A)'s prohibitions extend to union discipline imposed for certain prohibited purposes, but not the severity of otherwise lawful discipline.

Given this precedent, particularly the holding of the Supreme Court that Congress did not, by enacting Section 8(b)(1)(A), undertake to regulate union fines (or court enforcement of same) imposed on members for their failure to honor an authorized picket line, we cannot conclude that Congress nonetheless intended to have the Board regulate the size of these fines and establish standards with respect to their reasonableness. Indeed, as the legal enforceability of the fines is grounded in contract theory, it is obvious that the local courts are the more logical tribunals for the establishment of standards of reasonableness. While in *Wisconsin Motor* the Court noted that the fines in that case were reasonable in amount, the Court addressed itself more fully to this question in *Allis-Chalmers*, stating:

> There may be concern that court enforcement may permit the collection of unreasonably large fines. However, *even were there evidence that Congress shared this concern*, this would not justify reading the Act also to bar court enforcement of reasonable

fines.[32] [Other footnotes omitted and emphasis supplied.]

[32] It has been noted that the state courts in reviewing the imposition of union discipline, find ways to strike down "discipline [which] involves a severe hardship."

Thus, the Court's findings that the fines in those cases were reasonable seems directed to enforcing courts, encouraging those courts to make an independent determination of the reasonableness of the fine in each case presented,[19] in the same fashion as courts limit other union discipline which imposes a severe hardship. Such considerations are of an equitable nature rather than of the character of restraint and coercion with which the National Labor Relations Act treats.[20]

Finally, it is urged that large fines are a deterrent to the exercise of "job rights," and therefore coercive. Apparently our dissenting colleagues would not go this far—for he states that "regardless of the amount of a fine" he would find it clearly privileged under the proviso of 8(b)(1)(A) if enforced solely by internal union methods such as expulsion or suspension, except where the reasons for the fine offends some overriding statutory policy. Thus, it is not

[19] Where Congress desires that the Board make this type of determination, it has said so. Thus, Section 8(b)(5) of the Act authorizes the Board to decide whether or not initiation fees charged of employees required to join a labor organization under a union-security clause are excessive and discriminatory.

[20] Our dissenting colleague suggests that because no contention was made in the 8(b)(1)(A) cases before it that the fines involved were unreasonable, the Supreme Court did not "squarely rule" on the question of reasonableness. To so interpret these decisions is to hold that the Supreme Court will not accord weight to the very considerations it clearly indicates it expects lower courts to apply where collection of such fines is involved. It is more logical to conclude that no specific ruling on this issue was made because reasonableness was not relevant to the 8(b)(1)(A) issue before the Court.

the unreasonableness of the fine which the dissenting opinion finds to be an invasion of the statutory prohibition of Section 8(b)(1)(A), but the attempted collection of the fine through legitimate court proceedings. We find nothing in the Act or in the opinions of the Supreme Court which justifies so limiting a union's method for enforcement of its legitimate internal rules to its own internal procedures.

If our colleagues would further limit "coercive fines" to those actually enforced through external collection proceedings, our differing views would have no meaningful impact, for the courts, under the mandate of the Supreme Court, will have enforced *only reasonable fines*. However, in his view, the threat to collect an excessive fine by internal methods is also coercive. To this suggestion we would pose the query, what threat cognizable under Section 8(b)(1)(A) is there in an uncollectible fine that is not present in a reasonable collectible fine?[21]

The Board has long recognized that, as a practical matter, "virtually all union rules affect a member's employment relationship."[22] However, given the legitimacy of the rule, the only question of relevance to the agency enforcing this Act is "whether, in enforcing the rule, the Union goes outside the area of union-membership relationship and enters the area of employee-employer relationship."[23] The Union has not done so here, nor has it sought to vindicate a policy in conflict with the National Labor Relations Act, and the Act does not authorize this Board to evaluate the

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[21] The Court in *N.L.R.B.* v. *American Bakery & Confectionary Workers*, 411 F.2d 1122, (C.A. 7), did not treat with the argument that a fine, uncollectible in a court of law, was noncoercive but instead "specifically" found the argument "beside the point," because the purpose for which the fines were imposed, namely, to discipline employees for filing charges and cooperating in Board proceedings, would make any fine unlawful.

[22] *Allis-Chalmers Manufacturing Company*, 149 NLRB 67, 70.

[23] *Allis-Chalmers Manufacturing Company, supra.*

fairness of union discipline meted out to protect a legitimate union interest.

Accordingly, we shall dismiss the complaint in its entirety.

ORDER

IT IS HEREBY ORDERED that the complaint herein be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. August 27, 1970.

/s/ GERALD A. BROWN, Member
/s/ JOHN H. FANNING, Member
/s/ HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

(SEAL)

Member McCulloch, dissenting:

I am unable to agree with the conclusion of my colleagues that the reasonableness of the amount of a court-collectible fine imposed on a union member for failure to honor his union's picket line during a strike is not relevant to a determination of whether Section 8(b)(1)(A) of the Act has been violated.[24] In my view, the Supreme Court decisions cited by the majority do not command the result they reach, but rather support an opposite conclusion.

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[24] I would reach a different conclusion where the only sanction invoked or threatened for nonpayment of the fine, is expulsion or suspension from union membership. For, regardless of the amount of a fine, its enforcement solely by such internal methods appears clearly to be privileged by the proviso to Section 8(b)(1)(A), except of course in a situation—not the one before us—where the reason for the fine offends some overriding statutory policy. In *Minneapolis Star and Tribune Company*, 109 NLRB 727, relied upon by the majority as Board precedent for its position in this case, it does not appear that there was any actual or threatened court enforcement of the fine there involved.

In neither of the cited cases, as the Court was careful to note, was any contention made that the fines were unreasonable in amount.[25] As the question of reasonableness was therefore not directly before the Court, it was not squarely ruled upon. There are, however, clear indications in these decision, when read together, that a majority of the Court likely would have come to a different result had it appeared in those cases that the fines imposed were unreasonable in amount.

In *Allis-Chalmers*, the opinion for the Court was joined in fully by four justices; Mr. Justice White wrote a separate concurring opinion in which, while agreeing generally with the opinion of the Court, he expressed doubts "about the implications of some of its generalized statements."[26] Four other justices joined in the dissenting opinion written by Mr. Justice Black. In holding that the imposition of court-enforced fines for crossing a union picket line was outside the intended reach of Section 8(b)(1)(A), the Court, in the course of its principal opinion, at several points used the term "reasonable fine." Thus, at page 183, it stated:

> Where the union is strong and membership therefore valuable, to require expulsion of the member visits a far more severe penalty upon the member than a *reasonable fine*. [Emphasis supplied.]

At page 192, the Court rejected, in effect, the argument that its holding might result in the enforcement of unreasonably large fines, stating that such a contention "would not justify reading the Act also to bar court enforcement of *reasonable fines*." [Emphasis supplied.] And Mr. Justice White, explaining why he found the majority more persuasive than the dissent, focused on the reasoning of the Court's opinion

> that since expulsion would in many cases—certainly in this one involving a strong union—be a far more

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[25] *N.L.R.B.* v. *Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 193, fn. 30; *Scofield* v. *N.L.R.B.*, 394 U.S. 423, 430.

[26] *Allis-Chalmers*, 388 U.S. at 199.

> coercive technique for enforcing a union rule and for collecting a *reasonable fine* than the threat of court enforcement, there is no basis for thinking that Congress, having accepted expulsion as a permissible technique to enforce a rule in derogation of § 7 rights, nevertheless intended to bar enforcement by another method which may be far less coercive. [Emphasis supplied.] [27]

It is noted, too, that the dissenting opinion in *Allis-Chalmers* interprets the Court's holding as limited in its scope to "a court-enforced *reasonable fine.*" [28] [Emphasis supplied.]

Any doubt that the Court did not intend its holding in *Allis-Chalmers* to extend beyond "reasonable fines" was laid to rest by the Court's subsequent decision in *Scofield.*[29] The Court there summarized its decision in *Allis-Chalmers* as holding that

> a union rule, duly adopted and not the arbitrary fiat of a union officers, forbidding the crossing of a picket line during a strike . . . was enforceable [without violating 8(b)(1)(A)] against voluntary union members by expulsion or a *reasonable fine.* [Emphasis supplied.] [30]

The Court in *Scofield* further stated that

> 8(b)(1) leaves a union free to enforce a properly adopted rule which reflects a legitimate union inter-

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[27] *Id.* at 198.

[28] ". . . the Court's holding boils down to this: a court-enforced *reasonable fine* for nonparticipation in a strike does not 'restrain or coerce' an employee in the exercise of his right not to participate in the strike." [Emphasis supplied.] *Id.* at 200.

[29] *Scofield* v. *N.L.R.B.*, 394 U.S. 423.

[30] *Scofield* v. *N.L.R.B.*, 394 U.S. at 428.

> est, impairs no policy Congress has imbedded in the labor laws, *and is reasonably enforced* against union members who are free to leave the union and escape the rule. [Emphasis supplied.] [31]

It was "this view of the statute," the Court added, that "*must be applied*" [32] in determining whether Section 8(b)(1)(A) was violated by the enforcement of the fine in the case before it. [Emphasis supplied.] Then, after noting the absence of any "showing in the record that the fines were unreasonable," [33] and after finding that the other aforementioned conditions had been satisfied, the Court concluded:

> We affirm, holding that the union rule is valid and that its enforcement by *reasonable fines* does not constitute the restraint or coercion proscribed by § 8(b)(1)(A). [Emphasis supplied.] [34]

The Court's repeated use of the adjective "reasonable" in both *Allis-Chalmers* and *Scofield* to describe the fines there in issue cannot be passed over casually as without significance. By its carefully drawn distinction between "reasonable" and "unreasonable" fines, the Court, it seems to me, meant not only to define the limits of its holdings in these cases, but also to indicate affirmatively that it regarded court-collectible fines which were unreasonable, either in their nature or size, as not serving a legitimate union interest, and therefore not privileged from the proscription of Section 8(b)(1)(A).

Support for the view that the Supreme Court did not read the Act and its legislative history as removing "unreason-

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[31] *Id.* at 430.

[32] *Id.*

[33] *Supra*, fn. 25.

[34] *Scofield*, 394 U.S. at 436.

able" fines from the reach of Section 8(b)(1)(A) is to be found in the language from *Scofield*, quoted above, wherein the Court outlined the test that "must be applied."

Additional support is to be found in the Court's analysis in *Allis-Chalmers* of national labor policy considerations which led it in substantial part to conclude that Congress, in amending the Act in 1947, did not intend Section 8(b)(1)(A) to condemn a union's continued use of reasonable, disciplinary measures. The Court stated in part:

> Integral to this federal labor policy has been the power in the chosen union to *protect* against erosion its status under that policy *through reasonable discipline* of members who violate rules and regulations governing membership. That power is particularly vital when members engage in strikes. The economic strike against the employer is the ultimate weapon in labor's arsenal for achieving agreement on its terms, and "[t]he power to fine or expel strikebreakers is essential if the union is to be an effective bargaining agent. . . ." [Emphasis supplied.] [35]

Implicit in the Court's analysis of this aspect of national labor policy is the concept that a union has a legitimate interest in imposing *reasonable discipline* upon a voluntary member if needed to *protect* its status as an institution for effective bargaining, even though such discipline also serves to restrain and coerce the member's exercise of his Section 7 right to refrain from engaging in concerted activities. The corollary is that where otherwise lawful discipline oversteps reasonable bounds of needed protection and becomes essentially punitive in nature, it impairs federal labor policy. And since no *legitimate* union interest is then served, it remains within the compass of Section 8(b)(1)(A). Thus, expulsion, or enforcement of a fine solely by expulsion, con-

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[35] *Allis-Chalmers*, 388 U.S. at 181.

stitutes a legitimate exercise of internal union discipline, as it serves only to rid the union of a member not in sympathy with its objectives.[36] So, too, a court-enforced fine for violation of a legitimate rule must be viewed as presumptively protective, and therefore privileged when the amount of the fine, taking into account the character and importance of the ends served by the rule being enforced, is reasonably related to the need for protection. However, if the amount of a fine is such as to be inordinately disproportionate to the needed protection, an inference is warranted that the fine was imposed on the member, not in vindication of a legitimate union interest, but as a reprisal for having exercised a statutorily protected right.[37]

As is indicated in the Supreme Court cases cited above, and as is more concretely reflected in *N.L.R.B. v. Marine & Shipbuilding Workers*, 391 U.S. 418, the determination of whether union disciplinary action violates Section 8(b)(1)(A) involves a balancing process in which the union's interest in maintaining discipline is measured against public policies imbedded in the labor laws. In considering whether

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[36] An exception would be a case such as *Skura*, 148 NLRB 679, where the rule enforced by expulsion invades and frustrates an overriding statutory policy. See also *N.L.R.B.* v. *Marine and Shipbuilding Workers*, 391 U.S. 418.

[37] The imposition of such a disproportionately large fine may also be condemned as arbitrary union action. Although the Supreme Court in *Allis-Chalmers* expressly refrained from deciding, since it was unnecessary to the disposition of that case, "whether 8(b)(1)(A) proscribes arbitrary imposition of fines," the Court elsewhere in its decision at least intimated its view that federal labor policy, as shaped by the Courts, encompasses a policy against unfair or arbitrary conduct by a bargaining representative. Cf. *Vaca* v. *Sipes*, 386 U.S. 171. Though the policy embodied in a rule may not itself be objectionable, a fine for violation of the rule may nevertheless be considered "an arbitrary imposition" if it is so excessive in amount as to bear no fair relationship to the legitimate purposes of the policy served.

a fine, court-enforced, may, at least in certain circumstances, be so excessive in amount as to overcome a union's otherwise legitimate interest in enforcing its internal rules, the policy of the Act protecting employees from interference with their job rights is a consideration which, I believe, should not entirely be ignored.

Thus, where, as in this case, a court-enforceable fine imposed on employee-members for working during a strike is *greater* than the wages earned during the strike, it constitutes a total restraint on their right to refrain from engageng in the concerted activity, different in form but in economic reality the same as if they had been blocked at the plant gate by unlawful violence or a mass picket line. Few employees indeed will feel they have any choice in the matter knowing that if they do violate the union rule and go to work, they will be deprived of all the fruits of their labor. It may perhaps be arguable—a matter on which I now express no judgment—that a fine is justifiable in the protective interests of a union, if it does no more than strip an offending member of the profits of his rule violation. But such an argument is more difficult to sustain where, as here, the fine levied exceeds such gains.[38] In economic effect, to the extent of the excess, the employee is being assessed a sum representing wages he earned *after* the strike is over when the Union no longer needs protection. If the Union had caused the Employer to suspend the fined members without pay for even a brief period after the strike because they had worked during it, there could be no doubt of the Union's violation of Section 8(b)(1)(A). Yet in practical effect what the Union did here, and its coercive impact on employees, is no different. The last consideration, at the very least, it seems to me, would warrant an inference that the fines involved in this case were so excessive in amount in relation to the Union's

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[38] Cf. D. Bok and J. Dunlop, *Labor and the American Community*, 106-107 (1970).

legitimate disciplinary interests as to place them outside the scope of privileged internal union action.[39]

My colleagues take the position that the reasonableness of fines is an issue that must, and should, in all situations, be left for determination solely by local enforcing courts. I am unable to agree. To begin with, I do not share my colleagues' view that the Court's findings in *Allis-Chalmers* and *Scofield* pointing to the reasonableness of the adjudicated fines were simply "directed to enforcing courts" to encourage their examination of reasonableness in fine cases presented to them. That view overlooks the context in which the findings of reasonableness were made and the emphasis given them. Both cases were concerned with unfair labor practice issues only. And, in both, the Court was faced with an argument that though the fines then before the Court might be reasonable in amount, in other cases they might not be; that if *all* fines were ruled exempt from 8(b)(1)(A), it would allow the imposition of court-enforceable fines so large as to be the coercive equivalent of job loss. Considered in this context, I think the only logical conclusion is that the Court stressed the reasonableness of the fines which were before it only because it wanted to ensure that its decisions would not be overinterpreted to mean that unreasonable fines were also exempt from the coverage of Section 8(b)(1)(A). If, as the Court's carefully circumscribed holdings appear to imply, and my own study confirms, unreasonable fines, court collectible, remain subject to the statutory prohibition, it follows that where a fine is attacked as unreasonable in an unfair labor practice proceeding before the Board, the issue of unreasonableness *is* relevant and *must* be decided.

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[39] It is true, of course, that any fine, however small and reasonable in amount, may *indirectly* result in some degree of coercion of employees affecting their job rights. But it does not follow, as the majority appears to reason, that since small fines do not violate the Act, *ipso facto*, the Act is not violated by the imposition of any fine, however large and unreasonable. The situation here presented is one, I believe, in which a difference in degree constitutes a difference in kind.

It is true, as my colleagues suggest, that local courts may, and perhaps must, pass on the reasonableness of fines when suits are brought by unions to collect them. But this does not, of course, foreclose the Board from also doing so in an unfair labor practice proceeding. Nor do I think it appropriate for the Board to defer to another forum, thereby apply in effect a doctrine of "reverse preemption," on an issue so closely intertwined with considerations of statutory and federal labor policies.

Other policy considerations also favor the result I would reach. Thus, to leave an employee to his remedy from a state court might well leave him without any effective relief at all, for the cost of attorney fees alone in many cases will discourage attempts to defeat fines that are excessive. Moreover, I believe this is an area in which uniformity is desirable. Courts are likely to differ widely in their appraisal of what is or is not excessive, and the Board is in the best position to develop fair and uniform standards that are likely to gain general acceptance.

Although the line between what is a reasonable fine and what is not may not always be easy to draw, this is not reason enough for deferral to another forum. Nor is the Board disabled from acting because Congress has laid down no standards. The Board is neither powerless to, nor inexperienced in, making judgments of this kind when relevant to a determination of whether the statute has been violated.[40] Indeed, in a situation such as here presented, I be-

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[40] As noted in the majority decision, Section 8(b)(5) requires the Board in certain situations to determine whether a union initiation fee is "in an amount . . . excessive and discriminatory under all the circumstances." Although Congress set out certain relevant factors for the Board to consider, among others, in making the appraisal required by that section, it does not follow, as the majority seems to imply, that because of the absence of statutory guidelines with respect to the reasonableness of fines, the Board must be deemed without authority to consider that question by developing its own. In *N.L.R.B.* v. *Radio & TV Engineers*, Local 1212, 364 U.S. 573, the Court, in rejecting the Board's contention that it should not make an affirmative award of work under Sec-

lieve that in the discharge of our statutory responsibilities we must do so, unless we are to ignore completely the almost certain coercive impact that clearly excessive fines, backed by actual or threatened court enforcement, will have on statutorily protected rights.[41]

Because I believe my colleagues are in error is not considering on its merits, and deciding, the issue relating to the reasonableness of the fines involved in this case, I note my dissent from the majority decision.

Dated, Washington, D.C., August 27, 1970.

/s/ Frank W. McCulloch, Member
NATIONAL LABOR RELATIONS BOARD

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tion 10(k), since Congress failed to set forth standards to guide it in determining jurisdictional disputes on their merits, said that given this agency's experience in handling similar labor problems, "it need not disclaim the power given it for lack of standards." 364 U.S. at 583.

[41] It is clear that a threat to collect an unreasonable fine may be found unlawfully coercive even if the fine itself is not collectible. An employee confronted with the threat of court collection is not only uncertain of how the court will rule, but is also acutely aware that the costs of litigation come high. The possibility, or even the likelihood, that a court will ultimately refuse to enforce the fine to the extent that it is unreasonable does not withdraw from the threat its coercive impact. The argument that a fine may not be found violative of Section 8(b)(1)(A) if it is not collectible in a court of law has already been specifically considered and rejected in *N.L.R.B.* v. *American Bakery & Confectionary Workers*, 411 F.2d 1122 (C.A. 7), enfg. 167 NLRB 596. It is true, of course, that a threat to collect a reasonable fine may also be coercive in fact, yet is not to be viewed as unlawful for that reason alone. But in the area of union fines a distinction must be drawn between coercion in fact and coercion in law. Under the Supreme Court holdings, as I interpret them, court-enforced reasonable fines, regardless of their impact on employees, are outside the intended reach of Section 8(b)(1)(A)'s ban on coercive conduct; unreasonable fines, however, are not similarly exempt. Since court enforcement of a reasonable fine is lawful, the threat of such enforcement is also so. The opposite is true in the case of an unreasonable fine.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-1578

Local 1255, International Association of Machinists and Aerospace Workers, AFL-CIO, Petitioner, Cross-Respondent, versus National Labor Relations Board, Respondent, Cross-Petitioner.

Petition for Review and Cross-Application for Enforcement of an Order of the National Labor Relations Board (Texas Case)

(March 15, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges

THORNBERRY, Circuit Judge: This case is before the Court on the petition of Local 1255, International Association of Machinists and Aerospace Workers, AFL-CIO [the Union] to review and set aside an order of the National Labor Relations Board and on the cross-application of the Board to enforce the order.

On March 17, 1970 the Union struck Mason & Hanger-Silas Mason Company and established a picket line at the Company's Amarillo, Texas plant. Picketing continued from March 17 through April 3, 1970. Theron Howard, Jr., an employee of the Company, was a member of the Union when the work stoppage began. He crossed the picket line and worked throughout the strike. On March 18 the Union received a letter from Howard stating that he wished to be dropped from membership effective March 16, 1970.

On April 4, 1970 a member of the Union preferred intra-union charges against Howard for refusing to honor the picket line. Howard was found guilty as charged and the following penalty was voted by the Union:

> You shall be fined an amount equal to the wages earned by crossing the picket line at Pantex Plant or be expelled from any Local Lodge of the International Association of Machinists until the fine is paid and all other constitutional requirements are fulfilled.

Howard responded by filing an unfair labor practices charge against the Union based on § 8(b)(1)(A) of the National Labor Relations Act, 29 U.S.C.A. § 158(b)(1)(A).

> § 158(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title: *Provided,* That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;
>
> § 157 [§ 7 of the NLRA]:
>
> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities . . . .

A hearing before a Trial Examiner was waived by both parties and the case went directly to the Board.

The Board found that Howard's resignation was effective when received by the Union on March 18. It held that the Union was free to punish him for crossing the picket line

the two days before he quit the Union, March 17 and 18, but that it was barred by § 8(b)(1)(A) of the Act, *supra*, from disciplining him for postresignation strike-breaking.

This is a case of first impression in this Circuit. The facts are not in dispute. The legal issue before us, stated in its broadest terms, is whether a union may penalize a member, who resigns during a strike and returns to work, for conduct occurring after his resignation.[1] The Act does not provide a

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[1] This issue has apparently arisen only twice before. In *NLRB* v. *Granite State Joint Board, Textile Workers Union of America, Local 1029, AFL-CIO*, 1st Cir. 1971, 446 F.2d 369, the court did not decide the issue of a union's right vel non generally to punish postresignation strikebreaking. It held rather than when a union member votes to strike he waives any right he may have under § 7 of the Act to resign from the union and return to work during that strike with immunity from union discipline. In *Granite State* not only had the union members voted to strike, they also had voted unanimously to fine any member who crossed the picket line during the strike. On November 26, 1971 the Board filed a petition for certiorari in *Granite State* (Supreme Court Docket No. 71-711).

More recently another court of appeals decided that a former union member may not be subjected to union discipline for postresignation conduct. *Booster Lodge No. 405, Int'l Assoc. of Machinists and Aerospace Workers, AFL-CIO* v. *NLRB*, 1972, D.C. Cir. (Nos. 24687, 24744, February 3, 1972) [hereinafter referred to as the *Boeing case*]. The court distinguished the *Granite State* case, *supra*, on the ground that the penalty there was levied pursuant to a specific vote prior to the strike, while in the case before it the fine was based on a general provision of the union constitution. The *Boeing* court recognized, however, that its decision might conflict with *Granite State*. *Boeing*, *supra*, at note 19.

It is not clear to us whether these cases are in conflict. The *Boeing* court first seems to accept the Board's position that the Act absolutely forbids all union discipline for postresignation conduct of former members. The court then appears to retreat a little and base its decision not on the Act but on the union's constitution, which did not forbid voluntary resignation. The court refused to read in such a provision. The *Boeing* court specifically left open the question of whether a union may prevent resignation during a strike or discipline postresignation strikebreaking if it specifically

clear answer, but instead presents a somewhat conflicting matrix of legislation comprised of §§ 7 and 8(b)(1)(A). § 7 grants employees the right to refrain from concerted union activities except in circumstances not relevant here. § 8(b)(1)(A) makes it an unfair labor practice for a labor organization to restrain or coerce employees in the exercise of their § 7 rights. It would thus seem at first glance that an employee-union member is free to eschew participation in strikes without fear of union discipline. This is, however, not the law. Union *members* may be disciplined by various means, including court-enforceable fines. *NLRB v. Allis Chalmers Mfg. Co.*, 388 U.S. 175 (1967).

The Board argues, however, that although § 8(b)(1)(A) permits punishment of members, it absolutely prevents a union from imposing any form of penalty on an employee who has resigned from the union for conduct occurring after his resignation is effective. The Union replies that it has an unqualified right to punish members who quit during a strike for crossing the picket line during the remainder of that strike. The Union argues alternatively that the proviso to § 8(b)(1)(A), which permits unions to prescribe their own rules "with respect to the acquisition or retention of membership" in the union, at least gives it the right in the instant case to punish Howard for his postresignation strikebreaking by giving him the choice of paying a fine or being expelled.[2] We find the Union's alternative contention

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sets out these powers in its constitution or by-laws. *Boeing, supra,* at note 20. This footnote suggests that the court did not fully embrace the Board position, since the Act surely may be abrogated by union constitutional or by-law provisions.

We thus believe our resolution of the instant case is compatible with the *Boeing* and *Granite State* cases. To the extent that *Boeing* may be read to support the Board's position that all forms of discipline for postresignation picket-line-crossing are barred by the Act, we respectfully decline to follow it.

[2] The Board argues that the Union's alternate contention should not be considered by this Court, since it was not raised before the Board. 29 U.S.C.A. § 160(e). We disagree. The terms of the

persuasive. Since Howard had already resigned when the penalty was imposed, the thrust of the penalty was to condition readmission to membership on payment of the fine. The sanction for nonpayment of the fine was thus confined to the "acquisition or retention of membership," a domain which is reserved to the Union under the Act.

In the instant case the Board adopted the position it took in the *Boeing* case, *supra* at note 1, that employee's post-resignation acts are wholly beyond the pale of union discipline. The facts in the *Boeing* case were, however, distinguishable from those in the case before us. There the fines were not imposed in the alternative as they were here—that is, the employees were not given a choice of paying the fine or being expelled. In *Boeing* the union filed suit in some cases and threatened suit in others against its former members to collect their fines. In contrast, no suit has been filed in the instant case. Under the terms of the penalty imposed on Howard, see text *supra*, he may not be sued for crossing the picket line, but only may be expelled. We believe the Union's right to expell a member, or deny readmission to an ex-member, for not paying a fine is clearly protected by the proviso to § 8(b)(1)(A). The proviso makes no distinction between acts done while a member and those done while not a member. Either may be taken into consideration in determining who is to be admitted to membership or retained as a member. There is no doubt that the Union could have expelled Howard unconditionally for strikebreaking. It seems that if the Union may absolutely bar him from membership it may conditionally bar him subject to the payment of a fine.

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penalty assessed by the Union, which imposed a fine or expulsion in the alternative, were certainly before the Board during its deliberations. Although the record does not clearly indicate the points raised by both sides during their presentation to the Board, it can fairly be implied that the Board considered the terms of the penalty that was at the heart of the case. The Board had ample opportunity to consider the Union's alternate position.

In summary, we hold only that a union member who resigns during a strike and crosses his union's picket line to return to work may be fined by the union for his post-resignation strikebreaking when the fine is enforceable only by expulsion from the union.[3] We express no opinion on the broader issue raised by the parties but not presented by this case of whether the Act permits a union to levy fines for postresignation conduct that are ostensibly enforceable in court or by any means other than expulsion from union membership.

ENFORCEMENT DENIED

[3] It should be noted that since we interpret Howard's penalty as presenting him with the choice of paying the fine or being expelled, the Union may not sue to enforce the portion of the fine attributable to the two days he crossed the picket line before he resigned as it could have under the Board's decision.